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SUPREME COURT, U.S.

No. 80-6243

No. A-535

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

KAREN HELLER AND EARL HELLER,

APPELLANTS

V.

HANCOCK COUNTY CHILDREN SERVICES BOARD, ET AL.,

APPELLEES

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Ohio statutes, which allow the permanent termination of parental rights, where the child "lacks proper parental care" or where the child's "condition or environment is such as to warrant the state in the interests of the child, in assuming his guardianship," are unconstitutionally vague and indefinite in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the Ohio statutes, which require no showing of real or substantial harm to a child or exploration or exhaustion of less drastic alternatives before resort to permanent termination of parental rights, fail to provide natural parents, facing the loss of their child, with due process of law as required by the Fourteenth Amendment to the United States Constitution.

PARTIES

The parties to the appeal in the Supreme Court of Ohio were Karen Heller and Earl Heller, parents-appellants, the Hancock County Children Services Board, appellee, and Robert Sprague, guardian ad litem for Johnny Steven Heller, appellee.

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OPINIONS BELOW

There was no opinion filed by the Supreme Court of Ohio with its final judgment dismissing the appeal. The Court held that no substantial constitutional questions existed. The opinion on the merits was delivered at an earlier stage in the proceedings when the Court of Appeals for the Third Appellate Judicial District, Hancock County, Ohio, affirmed the judgment of the Hancock County Court of Common Pleas, Juvenile Division, denying the parents' motion to dismiss and permanently terminating parental rights. The memorandum opinions of the Court of Appeals and the Juvenile Court are unreported, but set forth in the Appendices and infra, at pages 7a through 32a.

JURISDICTION

The decision and judgment of the Supreme Court of Ohio were filed September 26, 1980. Notice of Appeal was filed in the Supreme Court of Ohio on December 18, 1980. The jurisdiction of this Court to review the decision by appeal is conferred by 28 U.S.C. Sec. 1257(2) and is sustained by the following decisions: Cohen v. California, 403 U.S. 15 (1971); Dahnke - Walker Milling Co. v. Bondurant, 257 U.S. 782 (1921).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section 2151.04(B) and (C) define a dependent child as follows:

> (B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian;
> (C) Whose condition or environment is such as to

warrant the state, in the interests of the child, in assuming his guardianship.

Ohio Revised Code Section 2151.05 defines a child without proper parental care as follows:

> Under sections 2151.01 to 2151.54 of the Revised Code, a child whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, neglected, abused, or delinquent; whose parents, stepparents, guardian, or custodian, when able, refuse or neglect to provide him with necessary care, support, medical attention, and educational facilities; or whose parents, stepparents, guardian, or custodian fail to subject such child to necessary discipline is without proper parental care or guardianship.

Ohio Revised Code Section 2151.353 provides as follows:

> If the child is adjudged an abused, neglected, or dependent child, the court may make any of the following orders of disposition:
>
> . . .
>
> (D) Commit the child permanently to the County Department of Welfare which has assumed the administration of child welfare, county children services board, or to any other certified agency. Upon such commitment the natural or adoptive parents are divested of all legal rights and obligations due from them to the child or from the child to them.
>
> No order for permanent custody shall be made at the hearing wherein the child is adjudicated abused, neglected, or dependent except and unless the complaint alleging the abuse, neglect, or dependency contains a prayer requesting such permanent custody and the summons served on the parents contains a full explanation that the granting of such an order permanently divests them of their parental rights.

STATEMENT OF THE CASE

This case originated on January 16, 1976, with the filing of a complaint by the Hancock County Children Services Board (the "Board") alleging the infant, Johnny Steven Heller, born January 15, 1976, to be dependent. A dependent child is defined by Ohio Revised Code §§ 2151.04(B) and (C) as one "who lacks proper parental care due to the physical or mental condition of his parents" or "whose condition or environment is such as to warrant the state in the interests of the child in assuming his guardianship." The child was adjudicated dependent and placed in the temporary care of the Board on April 14, 1976, on the grounds that since both parents were hospitalized, they were physically incapable of caring for their child (App. L, infra, p. 32).

On May 23, 1978, the Board moved for permanent custody of the child. On July 21, 1978, the parents raised their federal constitutional questions in a motion to dismiss (App. K infra, p.26a). An adjudicatory hearing and a dispositional hearing were held on August 15, 1978, at which the court overruled the parents' motion to dismiss (App. R infra, p.38a). On October 23, 1978, the court adjudicated the child dependent pursuant to R. C. §§ 2151.04(B) and (C) and "in the best interests" of the child permanently terminated parental rights (App. H infra, p. 22a).

At the hearing before the Juvenile Court on August 15, 1978, a psychologist serving as expert witness indicated that Mrs. Heller could be an adequate mother for Johnny (Tr. 86). Mr. Heller was described as not emotionally disturbed, but as operating in the moderate range of mental retardation (Tr. 35). Mr. Heller was further described as having difficulty processing stress and the expert expressed concern that Mr. Heller might inadvertently strike at someone (Tr. 37). Other testimony, however, established that Mr. Heller was not homicidal or suicidal, his hostility was expressed in profanity, and most significantly that Mr. Heller had a fifty-fifty chance of performing as an adequate parent with treatment (Tr. 86). The record also revealed that one reason for Mr. Heller's anger is that his son, Johnny, has been taken away (Tr. 263).

Although the expert believed that, with proper treatment, Mr. Heller could be able to care for Johnny and provide the child with proper psychological support, the Board instituted the parental rights termination action without making any effort to rehabilitate and reunify the family (Tr.128). While the expert testified that vocational, social, and academic training, as well as nursing assistance for Johnny, accompanied by gradual reintegration of the child into the parents' home had a good chance of success, and Mr. Heller indicated his willingness to cooperate in such treatment programs, no such help was offered by the agency.

The parents love and desire to have their son with them. Despite transportation problems they arranged three visitations with Johnny in 1978 with no assistance from the Board. Visitations were difficult because the Hellers had little income, lived in Toledo, Ohio, and had to visit Johnny in Findlay, Ohio. They have provided a room for Johnny, have sent him a birthday card in January, 1978 and an Easter card and some candy (Tr. 145).

Mrs. Heller wrote a letter asking how Johnny was in January, 1978 (Tr. 140). The parents indicated they would provide whatever medical attention Johnny needed (Tr. 238). Both parents have had experience caring for small children (Tr. 265, 274, 275).

The Board took no action to place Johnny back with the parents for a five month period on advice of the Board's counsel. The case worker assigned to the parents did not feel that agency had any duty to take affirmative initial steps to return the child, nor did the Board provide any specific guidelines advising caseworkers as to their duties toward family reintegration and treatment. The caseworker also felt that since a pleading for permanent custody had been filed, no treatment plan was necessary. The caseworker never communicated with the parents' counsel to advise him of the necessity for legal action to get Johnny back. Nor did she ever speak to the parents' counsel regarding a treatment plan. No effort was made to transfer Johnny's case to Lucas County (Toledo, Ohio) where the parents resided and the Board never offered to reimburse the Hellers for their trips to Findlay, despite their obvious poverty. Additionally, the caseworker unrealistically expected that the Hellers, who made $240.00 per month and were fifty dollars in debt, should financially contribute to Johnny's support while under custody of the Board.

In all, the Board failed to show that real or substantial harm to Johnny would occur if custody were given to the parents. The record further indicates a complete failure by the Board to exhaust less drastic alternatives to parental termination.

The Court of Appeals rejected the parents' contentions that the statutory language was vague, that no showing of real and substantial harm had been made, and that the State had a duty to exhaust less drastic alternatives to permanent termination of parental rights (App. F , infra, p. 13a). The Court of Appeals reasoned that any vagueness in the depending statute was cured by a statutory requirement for specific pleading, even though the amended motion contained almost no specifics (App. F, infra. p. 19a). The Court of Appeals further held that neither a showing of real and substantial harm nor exhaustion of less drastic alternatives to permanent termination were required by the Fourteenth Amendment to the United States Constitution, despite In re Cunningham, 59 Ohio St.2d 100 (1979) (App. F, infra, p. 20a).

On appeal to the Supreme Court of Ohio, these federal constitutional claims were denied without opinion (App. D , infra, p. 5a). From that dismissal, the parents filed a notice of appeal to the Supreme Court of the United States (App. B, infra, p. 2a). An extension of time was granted appellants to docket their appeal by February 23, 1981 (App.A , infra, p. 1).

THE QUESTIONS ARE SUBSTANTIAL

1. THE OHIO STATUTES WHICH ALLOW THE PERMANENT TERMINATION OF PARENTAL RIGHTS, WHERE THE CHILD "LACKS PROPER PARENTAL CARE" OR WHERE THE CHILD'S "CONDITION OR ENVIRONMENT IS SUCH AS TO WARRANT THE STATE IN THE INTERESTS OF THE CHILD, IN ASSUMING HIS GUARDIANSHIP," ARE UNCONSTITUTIONALLY VAGUE AND INDEFINITE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The questions presented by this appeal are the subject of confusion and disagreement among state and lower federal courts and have not before been dealt with by this Court. The questions are substantial since they concern the requirements of the Due Process Clause of the Fourteenth Amendment as they apply to the Ohio statutes governing the permanent termination of parental rights.

The Supreme Court of Ohio upheld Ohio Revised Code Sections 2151.04(B) and (C)[1] and 2151.05[2] against the parents' vagueness challenge (App. A, infra, p. 1a). Sections 2151.04(B) and (C), the statutory provisions under which the child was found to be dependent, offer no guidelines to avoid

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[1] Ohio Revised Code Section 2151.04(B) and (C) define a dependent child as follows:

> (B) Who lack proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian;
>
> (C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship.

[2] Ohio Revised Code Section 2151.05 defines a child without proper parental care as follows:

> Under sections 2151.01 to 2151.54 of the Revised Code, a child whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, neglected, abused, or delinquent; whose parents, stepparents, guardian, or custodian, when able, refuse or neglect to provide him with necessary care, support, medical attention, and educational facilities; or whose parents, stepparents, guardian, or custodian fail to subject such child to necessary discipline is without proper parental care or guardianship.

arbitrary decision making. Revised Code Section 2151.05 does not enhance the specificity of these sections. The "filthy and unsanitary" limitation of Section 2151.04 has no application to this case since no where in the record of pleadings is there any indication that this is a basis for the action. Moreover, the phrase employing the words "when able" has no application to this case since this is not a neglect but rather a dependency proceeding which refers to situations which have been caused through no fault of the parents. 2 D. Young and J. Carr, Anderson's Ohio Family Law 231 (1975). Consequently, the issue remains whether "proper parental care" and "condition or environment is such as to warrant the state in the interest of the child, in assuming his guardianship," without other clarifying statutory material, are sufficiently definite standards.

State action to sever this fundamental relationship does not satisfy the Due Process Clause when it is premised upon statutory standards that are vague and indefinite. Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd. on other grounds, 545 F.2d 1137 (8th Cir. 1976); Roe v. Conn, 417 F. Supp. 769, 669 (M.D. Ala. 1976). Davis v. Smith, 583 S.W.2d 37 (Ark. 1979).

The Supreme Court has indicated three criteria by which to determine whether an enactment is vague. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). First, the law must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. Id. In other words, the law must provide a fair warning. When the explanation of an indeterminate standard such as "proper parental care," Revised Code § 2151.04(B), first occurs at a dependency or termination hearing, it can hardly be argued that the parents were given fair warning of restricted conduct. Such a standard is one upon which men and women of ordinary intelligence would greatly disagree. Moreover, the statute as expanded by Revised Code § 2151.05 is circular and is couched in words with no commonly accepted meanings. "An examination of these phrases will not inform an ordinary person as to what conduct is required or must be avoided in order to parental termination." Alsager v. District Court of Polk County, Iowa, supra at 18.

A second danger of vague statutes is the impermissible delegation of discretion from the state legislature to social workers, police officers and judges. Grayned v. City of Rockford, supra. This danger is especially grave in the highly subjective context of determining the approved mode of

child rearing. See generally, Wald, "Neglected Children, A Search for Realistic Standards," 27 Stan. L. Rev. 983 (1976); Mnookin, "Foster Care, In Whose Best Interest?" 43 Harv. Ed. Rev. 599 (1973), Mnookin, "Child-Custody Adjudication," 39 Law and Contemporary Pubs. 226 (1975). The inevitability of ad hoc determinations under Ohio Revised Code § 2151.04 (B) and (C) opens the door to arbitrary and discriminatory parental terminations. By allowing officials to manipulate such vague standards, the choice of standard becomes effectively outcome-determinative.

The third danger inherent in vague statutes is the risk that "the exercise of constitutional rights will be inhibited. Grayned v. City of Rockford, supra. Under Revised Code § 2151.04 (B) and (C), parents will be forced to steer far wider of the unlawful zone than is constitutionally necessary. Such an inhibition of the parents' right to family integrity is not justified when the state is capable of enacting less ambiguous termination standards. Alsager v. District Court, supra at 18. It is clear that more specific standards for parental termination can be enacted. See e.g., Mich. Comp. Laws, Ann. § 722.23 (Supp. 1976); Institute of Judicial Admin. ABA Juvenile Justice Standards Project, Standards Relating to Abuse and Neglect (Tent. Draft 1977); Mnookin, "Foster Care, In Whose Best Interest?", supra at 631; Wald, supra at 1039.

The vague and indefinite language of Ohio's termination of parental care standards results in no effective notice of proscribed parental conduct. Taken together with the tremendous variance given state agencies and judicial officials to apply their subjective opinions in terminating parental rights, and the danger of impinging upon constitutionally protected rights, these violations demonstrate the substantial constitutional question at bar.

II. THE OHIO STATUTES, WHICH REQUIRE NO SHOWING OF REAL OR SUBSTANTIAL HARM TO A CHILD OR EXPLORATION OR EXHAUSTION OF LESS DRASTIC ALTERNATIVES BEFORE RESORT TO PERMANENT TERMINATION OF PARENTAL RIGHTS, FAIL TO PROVIDE NATURAL PARENTS, FACING THE LOSS OF THEIR CHILD, WITH DUE PROCESS AS REQUIRED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The State Statute Failed to Require Exhaustion of Less Drastic Alternatives.

This appeal raises the substantial questions of what resources or treatment a state is obligated to provide indigent parents, prior to permanent termination of parental rights.

The right to family integrity is sufficiently fundamental to be implicit in the concept of ordered liberty and is thus protected by substantive due process against illegitimate, and arbitrary interference by the state. Undue governmental interference into family life is constitutionally forbidden by a "host of cases, tracing their lineage" to Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923) and Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925), which have consistently acknowledged a private realm of family life, into which the state may not intrude without sufficient compelling reasons. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

Because of the sacred nature of that right, statutes infringing upon the parent child relationship must be subject to strict judicial review. To successfully withstand that standard of scrutiny, laws must be justified by a compelling state interest and must be narrowly drawn so as to effectuate only that compelling state interest. Roe v. Wade, 410 U.S. 113, 155 (1973). Further, when governmental action, as in this case, impinges on fundamental personal liberties, the means employed must be those which are least restrictive of those fundamental liberties. Shelton v. Tucker, 364 U.S. 479 (1960). As the court stated in Shelton:

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can more narrowly be achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose.

Id. at 488.

It is therefore, necessary that the state, in the pursuit of the welfare of Johnny Steven Heller, employ means which have not only a rational relationship to the state's goal, but are necessary and the least drastic intrusion into the parents' and child's family integrity.[4]

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[4]The situation in parental right termination proceedings is analogous to civil commitment in that both involve parens patriae intrusions by the state in areas of privacy. The Body of civil commitment law has held, that persons committed under "non penal" statutes for care and treatment, are entitled as a matter of due process to such care and treatment, in order to effectuate their return to family and community. Nelson v. Heyne, 355 F. Supp. 451, 459 (N.D. Ind. 1972), aff'd., 491 F.2d 352, 360 (7th Cir. 1974), cert. denied, 417 U.S. 976; Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354, 1364 (D. R.I. 1972); Morales v. Turman, 364 F. Supp. 166, 175 (E.D. Tex. 1973); Martarella v. Kelley, 349 F. Supp. 575, 585, 598-600 (S.D. N.Y. 1972), enforced, 359 F. Supp. 478 (S.D. N.Y. 1973); M v M, 336 N.Y.S.2d 304, 71 Misc. 2d 396 (Fam. Ct. 1970); In re I, 316 N.Y.S.2d 356 (Fam. Ct. 1970); Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973): Davy v. Sullivan, 354 F. Supp. 1320, 1328-1329 (M.D. Md. 1973)(three judge court); Gomes v. Gaughn, 471 F.2d 794, 800 (1st Cir. 1973); Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964), cert. denied, 407 U.S. 355 (1972); In re Maddox, 351 Mich. 358, 88 N.W.2d 470 (1958); Commonwealth v. Page, 339 Mass. 313, 159 N.E.2d 82 (1959); Director of Patuxent Institution v. Daniels, 243 Md. 16, 221 A.2d 397 (1966); Silvers v. People, 22 Mich. App. 1, 176 N.W. 2d 702 (1970); United States v. Walker, 335 F.Supp. 705, 708 (N.D. Cal. 1971); United States v. Pardue, 354 F. Supp. 1377, 1382 (D. Conn. 1973); Nason v. Superintendent of Bridgewater State Hospital, 253 Mass. 604, 612-613, 233 N.E.2d 908, 913-14 (1968); Maatallah v. Warden, Nevada State Prison, 86 Nev. 430, 420 P.2d 122 (1970).

Here it is advanced that just as due process entitles a civilly committed person to the least restrictive form of treatment, the family faced with a deprivation of "family privacy or autonomy" by state action is entitled to the least restrictive form of treatment in a community setting.

The Ohio statute under which the Hellers lost all rights to their son Johnny, contained no such provisions.

Johnny Steven Heller was not reunited with his natural parents because the record reveals that the Board took no efforts to provide the vocational, social, academic and nursing assistance, which, according to expert testimony, would have given (Tr. 86) Mr. Heller a fifty-fifty chance of becoming an adequate parent. The expert felt, as the trial court agreed, that Karen Heller, the mother, could function as an adequate parent (Tr. 86). The caseworker went so far as to fail, intentionally, for a five month period, to make any efforts to restore the child removed by the Board (Tr. No treatment plan was made and no effort to facilitate visitations (Tr.

The Hellers had to make whatever arrangements were necessary for visitation (Tr. 107). In fact, no guidelines were promulgated by which caseworkers of the Board could know how to implement their obligations to pursue less restrictive alternatives (Tr. 127, 213, 216).

In this case, the absence of an explicit statutory mandate, forced the parents unnecessarily to relinquish fundamental rights in violation of Fourteenth Amendment due process guarantees. Kruse v. Campbell, 431 F. Supp. 180, 188 (E.D. Va. 1977), Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 21 (D.C. Iowa 1975), Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976). That result was permitted by Ohio Revised Code Sections 2151.04(B) and (C) and 2151.353, despite the Ohio Supreme Court's implicit adoption of the least restrictive means principle in In re Cunningham, 59 Ohio St.2d 100 (1979).[5]

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5 the importance of maintaining a cohesive family unit, whenever possible (which), is found in R.C. §2151.01. The statute states that the provisions of R. C. Chapter 2151 should be liberally construed and interpreted to effectuate the purpose of "provid[ing] for the care, protection, and mental and physical development of children." (R.C. 2151.01[A].) Division [C] indicates further that the foregoing purpose should be achieved "whenever possible, in a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety." (Emphasis added.)

In re Cunningham, 59 Ohio St.2d 100, 105 (1979).

B. The State Statute Failed to Require A Showing of Real and Substantial Harm.

In addition to its failure to require a "less drastic alternatives" approach, the applicable statutes are ambiguous regarding the point at which the state's interest becomes sufficiently compelling to sever the parent-child relationship. In Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976), the Court felt the state's interest would reach such a level only when the child was subjected to "real physical or emotional harm and less drastic measures would be unavailing." Id. at 779. Another court has required a showing that the child is being harmed in a "real and substantial way" before a state may permanently terminate parental rights. Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 24 (S.D. Iowa 1975).

In the present case, no real or substantial harm to the child was shown. The parents, in fact, have never been given a chance to fail since the child was removed from their care immediately after birth.

The fact that the Ohio parental termination statutes (Ohio Revised Code Sections 2151.04(B) and (C) and 2151.353), permitted the Hellers to be deprived of their fundamental right to the custody of their natural child on such a dearth of evidence documenting substantial risk to the child, and with no attempt made at any solution prior to termination action, illustrates the unconstitutional nature of the Ohio statutes involved. The applicable statutes (Ohio Revised Code Statutes 2151.04(B) and (C) and 2151.353), failed to require or provide that due process of law be afforded parents facing termination of all rights to their children. Consequently, appellants here lost their child in violation of rights guaranteed them by the Fourteenth Amendment and do present a substantial question for review by this Court.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

Robin M. Kennedy
College of Law Legal Clinic
2801 West Bancroft Street
Toledo, Ohio 43606
(419) 537-2944

Attorney for Appellants

PROOF OF SERVICE

This is to certify that copies of the foregoing Jurisdictional Statement were served upon Steven C. Betts, Assistant Prosecutor for Hancock County, at 1330 North Main, P. O. Box 208, Findlay, Ohio 45840; and Thomas P. Kemp, Attorney for Robert F. Sprague, guardian-ad-litem, at 301 East Main Cross Street, Findlay, Ohio 45840 by regular United States mail this 23d day of February, 1981.

Robin M. Kennedy

Robin M. Kennedy
College of Law Legal Clinic
2801 West Bancroft Street
Toledo, Ohio 43606
(419) 537-2944

Attorney for Appellants

APPENDICES

APPENDIX A

Supreme Court of the United States

No. A-535

KAREN HELLER AND EARL HELLER,

Appellants,

v.

HANCOCK COUNTY CHILDREN'S SERVICES BOARD, ET AL.

O R D E R

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including February 23, 1961.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 18

day of December, 1960

IN THE SUPREME COURT OF THE STATE OF OHIO

IN RE: JOHNNY STEVEN HELLER

CASE NO. 80-1087

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Steven C. Betts
Assistant Prosecutor for Hancock County
1330 North Main Street
P. O. Box 208
Findlay, Ohio 45840

Thomas P. Kerr
Attorney for Robert F. Sprague
301 East Main Cross Street
Findlay, Ohio 45840

ATTORNIES FOR APPELLEE

Robin M. Kennedy
Attorney at Law
University of Law Legal Clinic
The University of Toledo
2801 West Bancroft Street
Toledo, Ohio 43606

ATTORNEY FOR APPELLANTS

FILED
DEC 18 1980
SUPREME COURT OF OHIO
THOMAS I. STARTZMAN, Clerk

IN THE SUPREME COURT OF THE STATE OF OHIO

IN RE: JOHNNY STEVEN HELLER : Case No 80-1087

: NOTICE OF APPEAL

:

Notice is hereby given that Karen and Earl Heller, the natural parents of Johnny Steven Heller, appellants, hereby appeal to The Supreme Court of the United States from the final judgment of The Supreme Court of the State of Ohio dismissing their appeal for lack of a substantial constitutional question entered in this matter on September 26, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Robin M. Kennedy
Attorney for the Appellants
College of Law Legal Clinic
The University of Toledo
2801 West Bancroft Street
Toledo, Ohio 43606
419/537-2944

PROOF OF SERVICE

Copies of the foregoing Notice of Appeal were served upon Steven . Betts, Assistant Prosecutor for Hancock County, at 1330 North Main, P. O. Box 208, Findlay, Ohio 45840; and Thomas P. Kemp, Attorney for Robert F. Sprague, guardian-ad-litem, at 301 East Main Cross Street, Findlay, Ohio 45840 by regular United States mail this 16th day of December, 1980.

Robin M. Kennedy
Attorney for the Appellants

APPENDIX C

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

HANCOCK COUNTY

FILED
COURT OF APPEALS
DEC 17 1980
CHARLES E. OMAN
CLERK
HANCOCK COUNTY, OHIO

In Re: JOHNNY STEVEN HELLER Case No. 5-78-30

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Karen and Earl Heller, the natural parents of Johnny Steven Heller, appellants, hereby appeal to The Supreme Court of the United States from the final judgment of The Supreme Court of the State of Ohio dismissing their appeal for lack of a substantial constitutional question entered in this matter on September 26, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Robin M. Kennedy
Attorney for the Appellants
College of Law Legal Clinic
The University of Toledo
2501 West Bancroft Street
Toledo, Ohio 43606
419/537-2911

PROOF OF SERVICE

Copies of the foregoing Notice of Appeal were served upon Steven C. Betts, Assistant Prosecutor for Hancock County, at 2330 North Main, P. O. Box 208, Findlay, Ohio 45840; and Thomas P. Kemp, Attorney for Robert F. Sprague, guardian-ad-litem, at 301 East Main Cross Street, Findlay, Ohio 45840 by regular United States mail this 16th day of December, 1980.

Robin M. Kennedy
Attorney for the Appellants

APPENDIX D

79-10-1 BARKLEY BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus.

1980 TERM

To wit: September 26, 1980

In re Johnny Steven Heller.

No. 80-1087

APPEAL FROM THE COURT OF APPEALS

for HANCOCK County

This cause, here on appeal as of right from the Court of Appeals for Hancock County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hancock County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ..... day of ..... 19.....

.....Clerk

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

HANCOCK COUNTY 10-443

IN THE MATTER OF BABY BOY HELLER, ALLEGED DEPENDENT CHILD. (EARL AND KAREN HELLER APPELLANTS.)

CASE NUMBER 5-78-30

JOURNAL ENTRY

FILED
COURT OF APPEALS
JUN 4 1980
CHARLES E. OMAN
CLERK
HANCOCK COUNTY, OHIO

This cause came on to be heard on appeal and was submitted to the court upon the record, the briefs and oral arguments of the parties.

Upon consideration the Court find no error prejudicial to the appellants in any of the particulars assigned and argued in appellants' brief.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Juvenile Division, Court of Common Pleas of Hancock County be, and the same hereby is, affirmed at the costs of the appellants and that the cause be, and the same hereby is, remanded to that court for execution. It is further ORDERED that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or any other provision of law. It is further ORDERED that the Clerk of this Court furnish a copy of any opinion filed concurrently with this journal entry directly to the trial judge.

Exceptions saved.

r

/s/ [illegible]

/s/ Edgar L. Mills

JUDGES.

(KERNS, J., of the Second Appellate District sitting by assignment

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

IN THE MATTER OF BABY BOY HELLER, ALLEGED DEPENDENT CHILD. (EARL AND KAREN HELLER, APPELLANTS.)

MEMORANDUM OPINION

(CASE NUMBER 5-78-30 - Decided June 4, 1980)

APPEAL: Court of Appeals for Hancock County.

MR. ROBIN M. KENNEDY, counsel for Appellants.

MESSRS. FIRMIN & SPRAGUE, Mr. Thomas P. Kemp, of counsel, attorney for Robert F. Sprague, Guardian Ad Litem for Johnny Steven Heller.

MR. STEPHEN C. BETTS, Assistant Prosecuting Attorney, for State of Ohio.

GUERNSEY, P.J. On January 16, 1976, a complaint was filed in the Juvenile Division, Court of Common Pleas of Hancock County, by a representative of the Hancock County Children's Services Board, alleging Baby Boy Heller, who was born the day before, to be a dependent child "in that he lacks proper care and support by reason of the mental condition of his mother and the physical condition of his father, to-wit: his father in in Lima State Hospital, Lima, Ohio, and his mother is mentally incapable of taking care of said child," the said

Board praying for his permanent care and custody. On February 24, 1976, the complaint was amended so that the allegation of dependency was changed to read: "in that he lacks proper care and support by reason of the physical condition of his father and mother, to-wit: his father is in Lima State Hospital, Lima, Ohio, and his mother is in the Toledo Mental Health Center, Toledo, Ohio."

After hearing, the trial court entered a finding on April 14, 1976, that he is a dependent child for the reason that as of the date of the complaint and the filing of the entry his father is a patient in the Lima State Hospital and his mother a patient at the Toledo Health Center. The court did not grant permanent custody as prayed for but ordered instead that temporary custody "remain with the Hancock County Children Services."

On April 17, 1978, a motion was filed by an assistant prosecuting attorney of Hancock County as counsel for the Hancock County Children Services Board reading in its entirety as follows:

> "Hancock County Children Services Board hereby moves the Court to grant it permanent custody of Johnny Steven Heller."

On May 23, 1978, this motion was amended by adding thereto in bold type a notice that "PERMANENT CUSTODY, IF GRANTED, WOULD CAUSE YOU TO LOSE ALL PARENTAL RIGHTS TO SAID CHILD, AND SAID

CHILD COULD BE PLACED WITH AN APPROPRIATE AGENCY FOR ADOPTION." Also added to the motion document was a memorandum reading as follows:

> "It is in the best interest of the child for him to be placed in a permanent adoptive home. The parents, while alleging on the date of the last hearing in this matter that they were capable of providing a home for said child, have made no attempt to obtain custody of said child and they have not provided any support for said child."

On July 21, 1978, the parents of the child moved to dismiss the complaint of January 16, 1977, and the motion of April 17, 1978, for various procedural reasons. This motion to dismiss was overruled by implication on October 23, 1978, when, after hearing, the trial court, reciting that the child had been found dependent on March 30, 1978, entered:

> " * * * the Court finds, by clear and convincing evidence, that Johnny Steven Heller is, at this time, a dependent child, and ORDERS, in the best interest of the child, that the permanent custody of Johnny Steven Heller be granted to Hancock County Children Services Board for purposes of adoption."

On August 15, 1978, at the close of the trial court orally granted the motion of counsel for the children services board "to amend the amended motion and the memorandum attached thereto and in order to conform to the evidence and indicate that we would add that the child lacks proper care or support by reason of the mental or physical condition of the parents and the child's environment or condition is such as to warrant the State in the interest of the child in assuming his guardianship. * * * and

the reasons are that the mental and emotional conditions as evidenced by the psychological reports and other evidence introduced here today indicate that the parents are unable to care for the special needs of this child and to care for the child properly."

From the order of permanent custody the parents of the subject child have appealed and assign error of the trial court in five particulars which we will consider out of the order assigned.

> "IV. The Amended Motion of May 23, 1978, Upon Which the Hearing Below Proceeded Failed to Recite Any Statutory or Factual Basis Upon Which the Parents' Rights Would be Divested in Violation of Juv. R. 10(B)(1) and the Due Process Clause of the Fourteenth Amendment.
>
> "V. The Trial Court's Amendment of the Amended Motion to Include Statutory References After the Evidentiary Hearing Violates Juv. R. 22."

In re Fassinger, 42 Ohio St. 2d 505, prescribes:

> "Under R.C. 2151.353, the filing of a complaint containing a prayer requesting permanent custody of minor children, sufficiently apprising the parents of the grounds upon which the order is to be based, and the service of summons upon the parents, explaining that the granting of such an order permanently divests them of their parental rights, are prerequisite to a valid adjudication for the purpose of obtaining an order for permanent custody divesting parental rights."

Appellants make no claim in this court of error, if any, of the trial court in invoking the continuing jurisdiction of the court by motion rather than by complaint, of improper service of summons, or of the telescoping of the adjudicatory

and dispositional hearings, so the only issues raised by the fourth and fifth assignments of error relate to the sufficiency of the allegations of the amended motion of May 23, 1978, as further amended on oral motion by oral order of the trial court at the close of all the evidence.

It is apparent from a review of the Fassinger case, supra, that the language of the amended motion of May 23, 1978, without consideration of the memorandum to the motion, is insufficient. It is also apparent that the language of the first sentence of the memorandum adds nothing to the sufficiency of the motion. However, the last sentence alleges specific facts relating to the subject child evidencing dependency within the definition of R.C. 2151.04(B).

In view of the general objectives of juvenile court legislation and the provisions of Juvenile Rule 1(B)(2) requiring that these procedural rules be liberally interpreted and construed so as to effectuate the purpose of securing simplicity in procedure, we are of the opinion that it is proper to consider the memorandum appearing as part of the motion document as part of the motion to determine whether appropriate allegations are made.

The allegations of the motion, thus considered, were effective to invoke the jurisdiction of the trial court and

sufficient to give due process notice to the parents of the claims and proof which would be presented in court so that they could effectively respond thereto.

The fourth assignment of error is without merit.

The fifth assignment of error is merely an extension of the fourth. Evidence was adduced on the complaint, without objection by the parents, as to areas of dependency not included within the allegations of the motion, specifically the area of dependency defined by R.C. 2151.04(C). Indeed, the parents adduced similar evidence, and joined in the admission into evidence of one exhibit, i.e., the deposition of Dr. Craenin, which related primarily to the need for specialized care for the juvenile and to the parent's inability to provide same.

Juvenile Rule 22(B) permits the amendment of any pleading after the commencement of the adjudicatory hearing upon order of the court if the interests of justice require. Subdivision (A) of the same rule defines pleadings as the complaint and the answer. A properly framed motion invoking the continuing jurisdiction of the juvenile court remaining to it after the making of a temporary commitment order to change such order to a permanent commitment order is in legal equivalence a complaint subject to amendment under this rule.

Because of the interest of the State of Ohio in juvenile cases in the welfare and best interests of the child it is

more important than it is in ordinary civil cases that there be leniency in the amendment of the complaint so that through inadvertence or oversight, or for the want of the right to amend, a child is not left in, or placed in, an environment not justified by the facts properly before the trial court.

Moreover, the rule provides that, where requested, a party shall be granted a reasonable time in which to respond to an amendment. The appellant parents made no such request and have waived any prejudicial error which might have occurred by reason of the granting of the motion.

The fifth assignment of error is, therefore, without merit.

"I. The Failure of the Court Below, in Applying the Standards of R.C. Secs. 2151.01(A)(C) and 2151.353, to Require a Showing of Real and Substantial Harm to the Child As A PreRequisite to Termination of Parental Rights and the Failure to Require the State to Pursue Less Drastic Alternatives Prior to Resorting to Termination of Parental Rights Deprived Appellants of Liberty Without Due Process as Required by the Fourteenth Amendment to the United States Constitution.

"A. The Residual Parental Rights at Stake in a Depositional [sic] Phase are Ranked as Fundamental and Protected by the Due Process Clause of the Fourteenth Amendment.

"B. The State Failed to Exhaust Less Drastic Measures to Secure the Welfare or Best Interests of the Child Prior to Termination.

"C. The Court Erred in Failing to Require the State to Not only Show that the Child Is Disadvantaged but Also to Show that the Child is Being Harmed in a Real and Substantial Way."

The thrust of this assignment of error in its various branches is the claim that following the determination by the trial court on April 14, 1976, that the subject child "remain" in the temporary custody of the Hancock County Children Services, it was incumbent upon that agency to provide training, treatment and assistance to the parents of such character as to qualify them to regain all of the rights of custody of the said child, and that to relieve them of any residual custodial rights without exhausting efforts to so provide deprived the parents of their constitutional rights of due process.

Such theory was brought to the attention of the trial court in the parents' motion to dismiss filed shortly before trial but related to a claim that the complaint must reflect that the state has "exhausted all less restrictive alternatives to complete termination." Such theory was, however, advanced by counsel for the parents during trial as a theory of proof but not placed specifically on a constitutional due process basis in his final argument to the court. Nevertheless, the theory, or issue, was before the trial court at least on an abstract basis as it applied to the dispositional phase of the trial court's proceeding and is

argued in this Court with respect to the same application. Appellants' counsel relies specifically on two federal cases, Stanley v. Illinois, 405 U.S. 645 (1972), and Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976). Neither of these cases are exactly in point or in full support of appellants' conclusions. Both were subject to consideration, and the former was specifically considered, by Chief Justice Celebrezze in his opinion in In re Cunningham, 59 Ohio St. 2d 100. In that case the Chief Justice said at page 105:

> "A recognition of the importance of maintaining a cohesive family unit, whenever possible, is found in R.C. 2151.01. The statute states that the provisions of R.C. Chapter 2151 should be liberally construed and interpreted to effectuate the purpose of 'provid[ing] for the care, protection, and mental and physical development of children.' (R.C. 2151.01[A].) Division (C) indicates further that the foregoing purpose should be achieved 'whenever possible, in a family environment, separating the child from its parents *only* when necessary for his welfare or in the interests of public safety.' (Emphasis added.)
>
> "Although the termination of the rights of a natural parent should be an alternative of 'last resort,' such an extreme disposition is nevertheless expressly sanctioned by the foregoing when it is necessary for the 'welfare' of the child. Therefore, with the purposes outlined in R.C. 2151.01 in mind, we conclude that an award of permanent custody, pursuant to R.C. 2151.353(D), is only justified when it is in the 'best interests' of the child. Such an interpretation of the statute is consistent with the time-honored precedent in this state that the 'best interests' of the child are the primary consideration in questions of possession or custody of children. * * *

"Thus the *fundamental* or *primary* inquiry at the dispositional phase of these juvenile proceedings is not whether the parents of a previously adjudicated 'dependent' child are either fit or unfit. The mere fact that a natural parent is fit, though it is certainly one factor that may enter into judicial consideration, does not *automatically* entitle the natural parent to custody of his child since the best interests and welfare of that child are of paramount importance. * * * Parental interests must be subordinated to the child's interest in determining an appropriate disposition of any petition to terminate parental rights. * * *

"As it has been perceptively noted elsewhere, 'it is plain that the natural rights of a parent are not absolute, but are always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed.' * * * *"

Applying both the Juvenile Code and Rules together with the rationale expressed by Chief Justice Celebrezze, and the holding in the Cunningham case, we find that the grounds set forth in the subordinate branches of this assignment of error are invalid and the actions therein claimed are not required by Fourteenth Amendment due process.

Highlighting the evidence before the trial court as to the best interests of the subject child was the undisputed depositional testimony of Dr. Craenen, a cardiac specialist, that it had been determined that the child had openings in his heart between its two upper chambers and its two lower chambers with a narrowing of the pathway to the lungs, requiring open heart surgery. The doctor further testified:

" * * * I cannot predict what's going to happen in the future. It is very possible that, though, we'll

attempt to close that lower hole. It will reopen with time. It is possible that the thickening of that muscle comes back and that he might need another operation later on, later. I hope not. This is not what happens most of the time, but that danger is definitely there; and he will need to be followed regularly and he definitely will need to be recatheterized five years from now, and then maybe ten years from now. He's going to be well, if things go well, growing up, I hope, if there is not complications. There are many complications possible, which we haven't touched, which would influence what's going to happen to him after the operation.

" * * *

" * * * He needs to be followed; he needs to be followed here cardiacwise until he's an adult. He will definitely require medication after the operation, for six months, a year. And how long, I do not know. But six months to a year is a minimum.

" * * *

" * * * [If he does not take his medication] He may die. He'll come back sick. He will go into congestive heart failure. Digoxin is a good drug. It's a dangerous drug. Too much and little will be dangerous. Too much, like a double dose a couple times in a row could cause a block. I mean, could lower his heart rate enought to become ineffective for his size, which could result in death if not treated -- sometimes with treatment. If he did not get his medication, his heart would degenerate, meaning it would get too weak to do the work it needs to do, and of course that also could result in death; and it's not always easy once they get into the degeneration, to get them out of it. I would be extremely upset if anything happened. I try to impress to parents very much that they have to be religious about giving the medicine. These kids need it.

" * * *

" * * * But he will never be able to do any heavy work. I will not allow him to compete in

heavy sports, like basketball, football. No."

It is also undisputed that the open heart surgery has taken place, that the child has been recuperating in the care of foster parents whose vice, if any, is overprotection of the child rather than the contrary. It is undisputed from the testimony of a practicing psychologist that both of the natural parents have been hospitalized from time to time for mental problems, that the father is mentally retarded in the moderate range, dependent on his wife, and manifests a volatile temper with a likelihood of striking out when under tension. The mother is not mentally retarded but the results of various intelligent quotient tests place her in the dull normal range of intelligence.

There are allusions in the record and statments of appellants' counsel during oral argument to an episode during the pregnancy of the mother when the father tied the mother to a railroad trestle, where she remained for two days, he bringing food and water to her. It does not appear whether he or others caused the termination of this episode.

In that there is no indication that the parents, who are living in a small house trailer, have any intention or ability to live elsewhere or have any intention to live separately the best interests of the child must be determined

in consideration that such home and the parents jointly constitute the environment to which the child would go if returned to them. In this connection it should be observed, however, that we find no motion of the parents pending before the trial court to terminate the temporary custody of the children services board, that they have not actively sought his custody, or significant visitation, and that the cause was before the trial court and had to be decided only on the board's motion to make its custody of him permanent.

It appears from the cited highlighted evidence, as well as from the other evidence in the record, that there was sufficient evidence before the trial court to support its determinations in favor of permanent custody.

We find the first assignment of error in all of its branches without merit.

> "II. The Standard of Dependency Applied in This Case and Defined in R.C. Sec. 2151.04(B) and (C), and 2151.05 are Vague in Violation of the Fourteenth Amendment."

This assignment of error, as aruged, is again a due process claim, i.e., that the standards are so vague as not to give fair warning to the parents as to what is or is not prohibited. In view of the fact that it is required that the complaint "allege the particular facts upon which the allegation of delinquency, unruliness, abuse, neglect,

dependency, or juvenile traffic offender is based," to give the parents notice of the specifics of the charge, we find no due process vagueness of the standard of dependency, and further find this assignment of error without merit.

"III. The Standard of 'Best Interest' of the Child Employed by the Court is Vague in Violation of the Due Process Clause of the Fourteenth Amendment."

The appellants argue that this "standard" fails to apprise them of prohibited conduct or of standards by which they can regulate their activities so as not to risk the termination of their rights. We find this argument wholly without merit. "Best interests" is not a standard of conduct but is the primary consideration in determining whether an award of permanent custody is justified pursuant to R.C. 2151.353(D). In re Cunningham, *supra*. "Best interests" is not a consideration in the adjudicatory phase in determining whether or not the child has achieved the status of a "dependent child" as defined by R.C. 2151.04.

We find this assignment of error wholly without merit.

Having found no error prejudicial to the appellant parents in any of the particulars assigned and argued, the judgment must be affirmed.

Judgment affirmed.

MILLER and KERNS, J.J., concur.
(KERNS, J., of the Second Appellate District sitting by assignment in the Third Appellate District.)

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

HANCOCK COUNTY

IN THE MATTER OF BABY BOY HELLER,
ALLEGED DEPENDENT CHILD.
(EARL AND KAREN HELLER, APPELLANTS)

FILED
COURT OF APPEALS
JUN 4 1980
CHARLES E. OMAN
CLERK
HANCOCK COUNTY, OHIO

Case No. 5-78-30

MINUTES

TO THE CLERK:

In the above entitled action, enter the following minutes on the Court of Appeals docket as of June 4, 19 80, and immediately give notice of these minutes to counsel of record in this case by mailing to each counsel of record a copy thereof (App. R. 22(B)) together with a copy of the journal entry of judgment filed herewith (App. R. 30(A)):

JUDGMENT AFFIRMED. SEE JOURNAL ENTRY.

(MEMORANDUM) OPINION FILED.

JUDGES

KERNS, J., of the Second Appellate District sitting by assignment in the Third Appellate District.)

(This constituting the announcement of the court's decision and a journal entry of judgment being filed by the court with the clerk for journalization herewith, any application for reconsideration must be filed within ten days. Appellate Rule 26. In the event that the application for reconsideration is granted the judgment so entered will be vacated should such action become appropriate.)

IN THE COURT OF COMMON PLEAS OF HANCOCK COUNTY, OHIO
COMMON PLEAS DIVISION

IN THE MATTER OF JOHNNY STEVEN HELLER, ALLEGED NEGLECTED AND DEPENDENT CHILD.

78 OCT 23 P 4:16 CASE NO. 76-042

ALLAN H. DAVIS JUDGE

JUDGMENT ENTRY

This matter came on for hearing on August 15, 1978 on the Motion filed by Hancock County Children Services Board for the permanent custody of Johnny Steven Heller, said child having been found dependent on March 30, 1976 by this Court.

Upon hearing the sworn testimony and considering the report of Robert D. Roberts, Ph.D., the Guardian Ad Litem's witness, and the sworn testimony of the witnesses presented on behalf of Hancock County Children Services Board and the parents of Johnny Steven Heller, the Court finds, by clear and convincing evidence, that Johnny Steven Heller is, at this time, a dependent child, and ORDERS, in the best interest of the child, that the permanent custody of Johnny Steven Heller be granted to Hancock County Children Services Board for purposes of adoption.

(See Memorandum Opinion of Judge Allan H. Davis.)

Allan H. Davis, Judge

APPROVED BY:

Robin H. Kennedy
Attorney for Earl Stanley Heller and
Karen Lee Heller

Robert F. Sprague
Guardian Ad Litem for Johnny Steven Heller

Stephen C. Betts
Assistant Prosecuting Attorney for
Hancock County, Ohio
Attorney for Hancock County Children
Services Board

APPENDIX I

IN THE COURT OF COMMON PLEAS OF HANCOCK COUNTY, OHIO

JUVENILE DIVISION

IN THE MATTER OF	SEPTEMBER 6, 1978
JOHNNY STEVEN HELLER	CASE NO. 76 042
ALLEGED NEGLECTED & DEPENDENT CHILD	MEMORANDUM OPINION

Johnny Steven Heller was found to be dependent in a hearing held in this Court on March 30, 1976. As a result of that finding he was placed in the temporary custody of Hancock County Children Services Board. He has remained in their temporary custody until this date and has been placed in foster care by that agency and has never lived with his natural parents, Karen Lee Heller and Earl Stanley Heller, since the date of his birth.

On July 1, 1977, Children Services filed an Amended Motion with the Court praying that it be granted permanent custody of the child. Following several hearings dealing with procedural matters, Children Services' Motion for Permanent Custody came on for hearing on the merits on August 15, 1978.

The Court heard numerous witnesses presented by Children Services, the parents, and the guardian ad litem, which primarily centered on the present status of the parents, Karen Lee Heller and Earl Stanley Heller.

From the evidence presented, the Court finds that Johnny Heller is a male child, 2½ years of age, who was taken from the natural parents at birth, and has never lived with his natural parents. Shortly after the child was born, the father was confined in the Lima State Hospital for testing, pursuant to an order of the Hancock County Common Pleas Court, and the mother was a patient at the Toledo Mental Health Center. Presently, Mr. and Mrs. Heller are living together as husband and wife in a house trailer in Toledo, Ohio. Neither parent is employed, and both are relying upon public assistance for their support. Mrs. Heller has been diagnosed as operating in the dull normal range of intellectual capacity, and the father has been evaluated as being in the mentally defective range, manifesting periodically an extremely volatile temper.

These facts represent just a portion of the evidence received by the Court in this case, but do play a large part in the decision reached. On the basis of these

facts, the Court would conclude that Mrs. Heller living by herself, apart from her husband could be granted the opportunity on a trial basis to raise her child. However, it would appear that Mrs. Heller intends to remain married to her husband, and would continue to live with him in the future.

Based on the above facts, and particularly the report and testimony offered by Robert D. Roberts, Ph.D., witness for the guardian ad litem (see guardian ad litem Exhibit No. 1), the Court finds that it is presently not in the child's best interest to return him to the custody of his natural parents, and the likelihood of doing so in the future is dim. For these reasons, the Court concludes that the best interest of the child would be served by placing him in the permanent custody of the Hancock County Children Services Board for the purpose of adoptive placement.

The Court wishes to express its thanks to all counsel for their diligent attention and active advocacy in this difficult case. Counsel for Hancock County Children Services Board to prepare an Entry in conformity with this opinion, submitting it to all counsel and the Court for approval.

ALLAN H. DAVIS
Judge
Common Pleas Court
Juvenile Division
Hancock County, Ohio

September 15, 1978

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APPENDIX J

IN THE COURT OF COMMON PLEAS OF HANCOCK COUNTY, OHIO

JUVENILE COURT

IN THE MATTER OF JOHNNY STEVEN HELLER, ALLEGED NEGLECTED AND DEPENDENT CHILD.

CASE NO. 76-042

AMENDED MOTION

Hancock County Children Services Board hereby moves the Court to grant it permanent custody of Johnny Steven Heller.

NOTICE: PERMANENT CUSTODY, IF GRANTED, WOULD CAUSE YOU TO LOSE ALL PARENTAL RIGHTS TO SAID CHILD, AND SAID CHILD COULD BE PLACED WITH AN APPROPRIATE AGENCY FOR ADOPTION.

Stephen C. Betts
Assistant Prosecuting Attorney for Hancock County, Ohio
Attorney for Hancock County Children Services Board

MEMORANDUM

It is in the best interest of the child for him to be placed in a permanent adoptive home. The parents, while alleging on the date of the last hearing in this matter that they were capable of providing a home for said child, have made no attempt to obtain custody of said child and they have not provided any support for said child.

Stephen C. Betts
Assistant Prosecuting Attorney for Hancock County, Ohio
Attorney for Hancock County Children Services Board

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Amended Motion and Memorandum was this day forwarded by United States First Class Mail, postage

END OF PAGE ONE. AMENDED MOTION AND MEMORANDUM, JOHNNY STEVEN HELLER, CASE NO. 76-042, CONTINUED TO PAGE TWO ATTACHED.

APPENDIX K

IN THE COURT OF COMMON PLEAS OF HANCOCK COUNTY, OHIO
JUVENILE DIVISION

78 JUL 21 AM : 22

In Re: : Case No. 76-042

JOHNNY STEVEN HELLER : MOTION TO DISMISS

Robin M. Kennedy #4529
Attorney for Earl Stanley
Heller and Karen Lee Heller
Mental Health Law Clinic
930 South Detroit Avenue
Toledo, Ohio 43614
419/381-8217 or 8218

The mother, Karen Lee Heller and the father, Earl Stanley Heller, move this court to dismiss the complaint of January 16, 1977, and the motion of April 17, 1978, for the following reasons:

1. The complaint and motion fail to allege either the "particular" or the "essential" facts upon which the allegations of dependency are based in violation of Ohio Revised Code §2151.27 and Juv. R. 10(B)(1) and the Fourteenth Amendment to the United States Constitution.

2. The parents have not been provided "notice by summons" nor were the parents provided, along with the copy of the motion of April 17, 1978, an explanation that the granting of permanent custody permanently divests the parents of their parental rights and privileges, in violation of Ohio Revised Code §2151.28(F).

3. Ohio Revised Code §2151.04(B) pursuant to which this action is commenced, is vague and overly broad and consequently the parents, Karen Lee Heller and Earl Stanley Heller, may be deprived of the custody of their child in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

4. The standard of proof required by Juv. R. 29(E)(4) in dependency proceedings permits a permanent termination of parental rights based upon a standard less than proof beyond a reasonable doubt in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, the parents move this court to dismiss the complaint in this action and to declare Ohio Revised Code

§2151.04(B) and Juv. R. 29(E)(4) unconstitutional as a violation of the Fourteenth Amendment to the Constitution of the United States.

Robin M. Kennedy
Attorney for Earl Stanley Heller and Karen Lee Heller

PROOF OF SERVICE

This is to certify that a copy of the foregoing motion and attached memorandum in support thereof has been served on Steven Betts, Assistant Prosecutor for Hancock County at his office at 1330 North Main, P.O. Box 208, Findlay, Ohio 45840 and Robert F. Sprague, Guardian Ad Litem, at 301 East Main Cross, Findlay, Ohio 45840 by ordinary United States mail this 20th day of July, 1978.

Robin M. Kennedy
Attorney for Earl Stanley Heller and Karen Lee Heller
Mental Health Law Clinic
930 South Detroit Avenue
Toledo, Ohio 43614
419/381-8217 or 8218

APPENDIX L

MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS

I. THE COMPLAINT AND THE MOTION FAIL TO ALLEGE EITHER THE PARTICULAR OR THE ESSENTIAL FACTS UPON WHICH THE ALLEGATION OF DEPENDENCY IS BASED IN VIOLATION OF OHIO REVISED CODE §2151.27 AND JUVENILE RULE 10(B)(1) AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The Bare Allegation that a Mother is Mentally Ill is Insufficient to State a Claim of Dependency Under Ohio Revised Code §2151.04.

Ohio Revised Code §2151.27 states that whenever there is an allegation that a particular child is "dependent" the complaint must allege the particular facts upon which the allegation of... dependency...is based. The same requirement is repeated in Juv. R. 10(B)(1) which provides that the complaint shall: "State in ordinary and concise language the essential facts which bring the proceeding within the jurisdiction of the court...." Mere conclusory allegations of dependency do not constitute an action upon which relief may be granted. In re Hunt, 46 Ohio St. 378, 348 N.E.2d 727.

Karen Lee Heller has been accused of being an improper mother because of her "mental condition". The mere allegation that a mother is mentally ill is insufficient as a grounds for a finding of dependency under Ohio Revised Code §2151.04 where there is no allegation as to the social, moral or economic fitness of the parent. In re Masters, 165 Ohio St. 503 (1956). In actuality Johnny Steven Heller was removed from his mother's care at the instant of birth. In her own words, Karen Lee Heller has never been given an opportunity to even feed her son. At the time of her son's birth, Mrs. Heller was not in a mental hospital, nor is there any allegation that she was mentally ill. The complaint merely employs the vague allegation that Mrs. Heller's mental "condition" was such as to render her an improper parent to her son. The complaint and the motion fail to state exactly what is Karen Heller's mental condition, nor

why the mental condition is such as to render her son a "dependent" child pursuant to Ohio Revised Code §2151.04.

Therefore, because the State fails to specify exactly what this mental condition is and why it renders Mrs. Heller an unfit parent, the complaint and motion must be dismissed.

B. The Complaint Should be Dismissed As It Fails to Allege that the State Has Exhausted all Less Restrictive Alternatives to Complete Termination, An Essential Fact Which Must be Pleaded Pursuant to Ohio Revised Code §2151.27 and Juv. R. 10(D)(1).

From the day after Johnny Steven Heller was born and up until the present day, the Hancock County Childrens Services Board has sought an order from this court that would grant the State permanent custody of the child, thereby causing the natural mother to lose all parental rights to said child. In Alsager v. District Court of Polk City, Iowa, 406 F.Supp. 10, 24 (U.S.D.C. S.D. Iowa 1975) the court described the complete termination of parental rights as a "drastic, final step...[which] must only occur where more harm is likely to befall the child by staying with his parents than by being permanently separated from them." In other words, the State must exhaust all less restrictive alternatives to complete termination before the court can order it. This concept is based on two competing interests. The first is the state's interest to protect the welfare of its minors. The Supreme Court has held that the State has the right and duty to protect minor children. Stanley v. Illinois, 405 U.S. 645,649 (1972). See also, Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The second competing interest is the parent's right to raise their children in an atmosphere free from governmental interference. Pierce v. Society of Sisters, 268 U.S. 510 (1925) and the fundamental right of family integrity. Stanley v. Illinois, supra. The right of a parent to raise the children which are born to them is the paramount interest that undeniably warrants deference except to a powerful countervailing interest. Stanley v. Illinois, supra, at 651. The state's interest in protecting its minor citizens, vis-a-vis complete termination of

parental rights is such a powerful countervailing interest, but only when the State can show that it has exhausted all less restrictive alternatives. See Alsager v. District Court of Polk City, Iowa, supra. This is the only sensible approach to be undertaken lest we have a society which will tolerate state interference to the extent that a parent could face permanently losing its child for a problem which is temporary in nature. The obvious intent of the Supreme Court is to preserve the parent-child relationship until it appears that more harm will befall the child by continuing the relationship than by permanently terminating it. Alsager, supra, at 24. Therefore, the fundamental right of family integrity imposes on the State a duty to exhaust all less restrictive alternatives. Ohio Revised Code §2151.27 and Juv. R. 10(B)(1) requires that the State allege all the particular and essential facts upon which an allegation of dependency is based. Because the State is requesting permanent custody as a result of the alleged dependency of the child, an essential fact is that all less restrictive alternatives to permanent custody have been exhausted. The exhaustion requirement, being an essential fact, is therefore required to be pleaded in accordance with Ohio Revised Code §2151.27 and Juv. R. 10(B)(1). A complaint which fails to include the essential facts does not properly invoke the jurisdiction of this court. In re Hunt, 46 O.S.2d 378 (1976).

The complaint, in this case merely states that the child is dependent because of the mental condition of his mother and the physical condition of his father. There is no allegation, whatsoever, that the State has even tried any other alternative short of complete termination, let alone, exhaustion of all alternatives.

Accordingly the complaint should be dismissed as it does not meet the requirements of Ohio Revised Code §2151.27 and Juv. R. 10(B)(1), in that it fails to allege all the essential facts upon which the complaint is based.

III. THE "DEPENDENT CHILD" AS DEFINED IN OHIO REVISED CODE §2151.04 IS UNCONSTITUTIONALLY VAGUE, BOTH ON ITS FACE AND AS APPLIED TO THE DEFENDANT.

A. The Parents' Right to the Companionship, Care, Custody and Management of their Children is Fundamental and Protected by the Due Process Clause of the Fourteenth Amendment.

Deeply rooted in the traditional and conscience of the American people are those liberties that are so important as to be ranked fundamental and deserving of protection of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Palko v. Connecticut, 302 U.S. 319, 325 (1937); Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925). See also, Griswold v. Connecticut, 381 U.S. 479, 481-485 (1965). A parent's right to the companionship and management of his children is one of those liberties, having a basis in natural law, around which evolved strict constitutional protections.

A right is determined to be fundamental by ranking constitutional rights within a "spectrum of importance". Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972). As the Fifth Circuit stated:

> At one end of the spectrum are great liberties such as speech, religion and association specifically guaranteed in the Bill of Rights. Of equal importance are liberties such as the right of marital privacy that are so fundamental that, even in the absence of positive commands from the constitution, they may be restricted only for compelling state interest. [Id. at 619.]

The Supreme Court of the United States has frequently emphasized the importance of the parents' right to the companionship, care, custody and management of their children. This right has been deemed "essential", Meyer v. Nebraska, supra at 399, and recognized as one of the "basic civil rights of man," Skinner v. Oklahoma, supra at 541; and "far more precious...than property rights." May v. Anderson, 345 U.S. 528, 533, (1953).

APPENDIX M

IN THE COURT OF COMMON PLEAS OF HANCOCK COUNTY, OHIO

JUVENILE DIVISION

76 APR 14 A 8: 36

IN THE MATTER OF

JOHNNY STEVEN HELLER

ALLEGED DEPENDENT CHILD

MARCH 30, 1976

CASE NO. 76-042

JOURNAL ENTRY

This day came on to be heard an amended complaint filed by Barbara Russo, caseworker for the Hancock County Children Services, alleging the above captioned child to be dependent.

In attendance at said hearing were Robert F. Sprague, guardian ad litem for Johnny Steven Heller; Stanley Earl Heller, father of said child, accompanied by his Court appointed attorney, Robert B. Downing; Roger P. Sugarman, Attorney, who entered his appearance on behalf of Karen Heller, mother of said child, (Charles Van deCarr, legal intern, previously representing Mrs. Heller, having been relieved of his duties as counsel by order of this Court); Stephen C. Betts, Assistant Prosecuting Attorney, representing the Hancock County Children Services; Mrs. Barbara Russo, caseworker for the Hancock County Children Services, and Mrs. Pamela Burchnell, supervisor for said Children Services.

Robert B. Downing, upon the Motion of Mr. Betts, was appointed guardian ad litem for Stanley Earl Heller.

Whereupon, Mr. Betts moved to amend the amended complaint, as filed in this matte Said amendment to be by interlineation, to read, "he lacks proper care and support by reason of the physical condition of his father and mother, to-wit: his father is in Lima State Hospital, Lima, Ohio, and his mother is in the Toledo Mental Health Center, Toledo, Ohio, all in violation of Section 2151.04 (B) of the Ohio Revised Code..."

Said Motion was granted by the Court.

Whereupon, the Court entered a finding that Johnny Steven Heller is a dependent child, as it was stipulated by all the parties that, Karen Heller, was, as of February 24, 1976, the date of the filing of the complaint, and is to this date, a patient at Toledo Mental Health Center, and that Stanley Earl Heller, was, as of February 21, 19 and is to this date, a patient in the Lima State Hospital.

The Court saved exceptions to this finding for all the parties.

Upon the adjudication of the dependency of Johnny Steven Heller, the Court moved to the dispositional phase of the proceedings, and after hearing the recommendations all the parties, the Court, hereby, orders that the temporary custody of Johnny Steven

Heller, remain with the Hancock County Children Services, and leave was granted to ... concerned to file appropriate Motions, at any time, to amend the order.

No order was made as to visitation.

All until further order of the Court.

ALLAN H. DAVIS
Juvenile Division

APPROVED:

Roger P. Sugarman
Attorney for Karen Heller

Robert B. Deming
Attorney for Stanley Earl Heller

Robert F. Sprague
Guardian Ad Litem for
Johnny Steven Heller

Stephen C. Betts
Assistant Prosecuting Attorney
Representing Hancock County Children Services

APPENDIX B

Juv. 5172

AMENDED
COMPLAINT
(CHILD OR CHILDREN)
R.C. Sec. Code 2151.27

In the Court of Common Pleas, Juvenile Court Division, Hancock County, Ohio

IN THE MATTER OF

Johnny Steven Keller
Blanchard Valley Hospital
Findlay, Ohio

CASE No.

alleged Dependent child

The undersigned, after being first duly cautioned and sworn says that Eleanor Barbara Kureo, Caseworker, Hancock County Children Services has knowledge of (a) a certain child, to-wit:

Johnny Steven Keller age 2 year (D.O.B. 3/10/70)

who appear(s) to be a (n) Dependent child(ren)

in that he lacks proper care and support by reason of the mental condition of his mother and the physical condition of his father, to-wit: his father is in Lima State Hospital, Lima, Ohio, and his mother is unable incapable of taking care of said child, all in violation of Section 2151.04 (E) of the Ohio Revised Code, and

contrary to the peace and dignity of the state of Ohio

or

n) Wherefore, Hancock County Children Services Board prays for the permanent care and custody of said child.

That the name of the person or persons having custody or control or with whom he now resides are: Karen Keller — Stanley Earl Keller

residing at 511 Washington St. Findlay, Ohio 45840 — Lima State Hospital Lima, Ohio 45801

And that the following are facts concerning the present circumstances of the said child(ren) of which the Court should be informed.

[redacted]

Complainant

Address

Phone

Sworn to before me and signed in my presence this [redacted] day of [redacted], 19[redacted]

Attorney

By [redacted]
Deputy Clerk

(a) Put name, birth date and address of child
(b) Insert "neglected" or "dependent" or "abused" or "neglected and dependent" or "abused and dependent"

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section 2151.04(B) and (C) define a dependent child as follows:

> (B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian;
>
> (C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship.

Ohio Revised Code Section 2151.05 defines a child without proper parental care as follows:

> Under sections 2151.01 to 2151.54 of the Revised Code, a child whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, neglected, abused, or delinquent; whose parents, stepparents, guardian, or custodian, when able, refuse or neglect to provide him with necessary care, support, medical attention, and educational facilities; or whose parents, stepparents, guardian, or custodian fail to subject such child to necessary discipline is without proper parental care or guardianship.

[§ 2151.35.3] § 2151.353 Disposition of neglected or dependent child.

If the child is adjudged an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

(A) Permit the child to remain with his parents, guardian, or other custodian, subject to such conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child;

(B) Commit the child to the temporary custody of the department of public welfare, a county department of welfare which has assumed the administration of child welfare, county children services board, any other certified organization, the Ohio youth commission for the purpose of diagnostic study and report as provided by division (B) of section 5139.05 of the Revised Code, either parent or a relative residing within or outside the state or a probation officer for placement in a certified foster home;

(C) Commit the child to the temporary custody of any institution or agency in this state or another state authorized and qualified to provide the care, treatment, or placement that the child requires;

(D) Commit the child permanently to the county department of welfare which has assumed the administration of child welfare, county children services board, or to any other certified agency. Upon such commitment the natural or adoptive parents are divested of all legal rights and obligations due from them to the child or from the child to them.

No order for permanent custody shall be made at the hearing wherein the child is adjudicated abused, neglected, or dependent except and unless the complaint alleging the abuse, neglect, or dependency contains a prayer requesting such permanent custody and the summons served on the parents contains a full explanation that the granting of such an order permanently divests them of their parental rights.

HISTORY: 131 v H 320 (Eff 11-19-65); 134 v H 85, Eff 11-26-71.

Cross-References to Related Sections

All children in permanent custody to be listed with public welfare department, RC § 5103.15.2.

Purpose of temporary commitment to youth commission, RC § 5139.05.

See RC §§ 2151.35.4, 2151.35.5 which refer to this section.

Text Discussion

2 Anderson Fam. L. § 13.5.

Research Aids

Disposition of neglected or dependent child:
O-Jur2d: Juvenile Courts § 49
Am-Jur2d: Juvenile Courts etc. § 29 et seq.

Law Reviews

Due process in Ohio for the delinquent and unruly child. Beverly E. Sylvester. 2 CapitalULRev 23 (1973).

The law of adoption in Ohio. Beverly E. Sylvester. 2 CapitalULRev 23 (1973).

Ohio Rules

This section is affected by Juv.R. 10(D), 15(B)(5), 29(F), 32(A)(3), 34(C), (D), (E) and 35.

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See also case notes 25 under RC § 2151.23; 7 under RC § 2151.27; 8 and 9 under RC § 2151.28.

1. Under RC § 2151.35.3, the filing of a complaint containing a prayer requesting permanent custody of minor children, sufficiently apprising the parents of the grounds upon which the order is to be based, and the service of summons upon the parents, explaining that the granting of such an order permanently divests them of their parental rights, are prerequisite to a valid adjudication that a child is neglected or dependent for the purpose of obtaining an order for permanent custody divesting parental rights. In re Eswinger, 42 OS(2d) 305, 71 OO(2d) 303, 330 NE (2d) 431 (1975).

2. The mere allegation in a motion filed by the county welfare department that "it would appear to be in the best interests of said minors that they be placed permanently for adoption" does not state grounds under which a Juvenile Court may lawfully take permanent custody of children from their natural parents. In a hearing conducted pursuant to RC § 2151.35, in which the welfare department seeks to take permanent custody of children from their natural parents, the welfare department has the burden to plead and prove by clear and convincing evidence that the children are presently neglected or dependent. An adjudication of dependency made in a temporary custody hearing does not constitute legal grounds for granting permanent custody of minor children to the welfare department where over 22 months have elapsed between the temporary and permanent custody hearings, and where custody had been returned to the natural parents in the interim period between the temporary and permanent custody hearings. The granting of permanent custody under such circumstances requires a contemporaneous finding of dependency. In re Eswinger, 43 OApp(2d) 80, 72 OO(2d) 292, 331 NE(2d) 5 (1974).

3. Permanent custody of a dependent child will be granted to the county welfare department if it is for the best interest of a child, despite the well-intentioned concern of the maternal grandparents who wished to adopt the child. In re Baby Girl, 32 OMisc 217, 61 OO(2d) 439, 290 NE(2d) 925.

4. Both the existing juvenile code and the Juvenile

Court: Thank you, Mr. Sprague.

Well, Mr. Kennedy, as to your motions to dismiss. You've raised some interesting arguments in your motion that could quite possibly be intriguing to an appellate court. I think the matters that you raise in your motions to dismiss have been previously decided by Ohio Courts and as to the four branches of your motion that I have studied, I will overrule your -- the four branches of your motion to dismiss on the basis that the questions raised have been previously decided by Ohio Courts, particularly the burden of proof in neglect and dependency cases which well establish clear and convincing evidence not by evidence beyond a reasonable doubt.

The Dependency Statute has been found to be Constitutional in the State of Ohio. The other matters have been previously covered by courts. So, on that basis, I will overrule your motion and save any exceptions you might have to my ruling.

Mr. Kennedy: Your Honor, might I request the Court to provide conclusions of law in writing on these rulings?

Court: Do you cite an authority for requesting that?

No. A-535

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

80-6243

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SUPREME COURT, U.S.

EARL AND KAREN HELLER,
APPELLANTS,

V.

HANCOCK COUNTY CHILDREN SERVICES BOARD, ET AL

APPELLEES,

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The appellants, Earl and Karen Heller, who have now permanently lost custody of their child, Johnny Steven Heller, ask leave to file the attached Jurisdictional Statement in the Supreme Court of the United States without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The appellants' affidavit in support of this motion is attached hereto.

Appellants further state that in all courts below leave to proceed in forma pauperis was sought and granted. See State, ex rel. Heller, v. Miller, 61 Ohio St. 2d 6 (1980).

Robin M. Kennedy

Robin M. Kennedy
College of Law Legal Clinic
2801 West Bancroft Street
Toledo, Ohio 43606
(419) 537-2944

Attorney for Appellants

PROOF OF SERVICE

This is to certify that copies of the foregoing Motion for Leave to Proceed in Forma Pauperis were served upon Steven C. Betts, Assistant Prosecutor for Hancock County, at 1330 North Main, P. O. Box 208, Findlay, Ohio 45840; and Thomas P. Kemp, Attorney for Robert F. Sprague, guardian-ad-litem, at 301 East Main Cross Street, Findlay, Ohio 43840 by regular United States mail this 23d day of February, 1981.

Robin M. Kennedy

Robin M. Kennedy

No. A-535

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RECEIVED
FEB 24 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

EARL AND KAREN HELLER,
APPELLANTS,

V.

HANCOCK COUNTY CHILDREN SERVICES BOARD, ET AL.,
APPELLEES,

AFFIDAVIT OF POVERTY

STATE OF OHIO)
) ss.
COUNTY OF LUCAS)

I, Karen Heller, being first duly sworn, depose and state that I have income in the amount of $283.00 per month from Social Security Disability. That I have no savings; that I own no real estate and no personal property of any significant value. I am unemployed at the present time. I am unable to prepay the costs of filing an appeal to the Supreme Court of the United States and I am unable to pay the lawyer's fees for this purpose.

I reside at 5053 Bennett Road, Toledo, Ohio 43612.

Karen L. Heller
Karen Heller

Sworn to and subscribed in my presence this 22nd day of December, 1980.

Lora F. Tiemeyer
Notary Public

LORA F. TIEMEYER
NOTARY PUBLIC
MY COMMISSION EXPIRES 6/1/85

No. A-535

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EARL AND KAREN HELLER,

APPELLANTS,

V.

HANCOCK COUNTY CHILDREN SERVICES BOARD, ET AL.,

APPELLEES,

AFFIDAVIT OF POVERTY

STATE OF OHIO)
) ss.
COUNTY OF LUCAS)

I, Earl Heller, being first duly sworn, depose and state that I have income in the amount of $177.00 per month from Social Security Disability. That I have no savings; that I own no real estate and no personal property of any significant value. I am unemployed at the present time. I am unable to prepay the costs of filing an appeal to the Supreme Court of the United States and I am unable to pay the lawyer's fees for this purpose.

I reside at 5053 Bennett Road, Toledo, Ohio 43612.

Earl S Heller
Earl Heller

Sworn to and subscribed in my presence this 22nd day of December, 1980.

Lora A. Jenny
Notary Public
LORA E. JENNY
[illegible] 5/10/85

80-6243

NO. A-535

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

KAREN HELLER AND EARL HELLER,

APPELLANTS

V.

HANCOCK COUNTY CHILDREN SERVICES BOARD, ET AL,

APPELLEES

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

AND

MOTION TO AFFIRM JUDGMENT OF LOWER COURTS

Stephen C. Betts
Assistant Prosecuting Attorney for
Hancock County, Ohio
101 West Sandusky Street
Findlay, Ohio 45840
Telephone: (419) 422-5565

ATTORNEY FOR APPELLEE, HANCOCK COUNTY
CHILDREN SERVICES BOARD

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MOTION TO DISMISS

The issues presented in this matter are moot as Johnny Steven Heller, the child subject of the action presented to this Honorable Court, has legally been adopted by way of proceedings in the Hancock County, Ohio, Common Pleas Court, Probate Division, being captioned as Case No. 80-471. The adoption took place on November 7, 1980 while no proceedings were pending in any court as related to the rights of Karen Heller and Earl Heller, Appellants herein.

Therefore, the issues presented in the specific case before this Honorable Court are moot.

Further, the issues presented herein are moot as a result of legislation passed by the Ohio Legislature, being Amended Substitute House Bill No. 695 which became effective November 24, 1980 (See Appendix 1), which sets forth proceedings for the exploration or exhaustion of less drastic alternatives before resorting to permanent termination of parental rights.

The issues presented by way of the Jurisdictional Statement of Appellants are therefore moot, and jurisdiction of the Supreme Court of the United States should be denied.

The basis of an action in dependency within the State of Ohio relates to the environment of the child and not the culpable acts of the parents.

In re Infant East, 61 O.O. 2d 38, Syllabus 2, states that:

> "The crux of a dependency action is the condition of environment of the child, not the culpable acts of the parents."

Therefore, since the basis of a dependency action does not require culpable actions by the parents but relates to environment, the parents do not require a warning regarding prohibitions as alluded to in Appellants' argument. Thus, there is no violation of the Fourteenth Amendment.

Further, Appellants attempt to place all responsibility upon the Hancock County Children Services Board for placing the child within the custody of the parents. The complete record in this matter indicates that the parents did not take affirmative steps to secure the return of their child. Any delays on the behalf of the Hancock County Children Services Board were an attempt to define the parents' true attitude toward the return of their child, and they took no positive steps to secure same.

A statute similar to the Ohio statute has been affirmed by the Kansas Supreme Court. (See In re Brooks, decided November 11, 1980, at 7 Family Law Review, Page 2046.) The Kansas Supreme Court affirmed the right of a child welfare agency to take permanent custody under a statute similar to the Ohio statute, and further indicated that the termination of parental rights is dispositional in nature as opposed to definitive of required actions of the parents. The Kansas Supreme Court found that their statute did not violate the due process clause of the Fourteenth Amendment to the United States Constitution even though it did not incorporate a doctrine of least restrictive alternatives. The decision indicated that the parents must cooperate with the agency and show a desire to have a child returned to their custody.

CONCLUSION

For the foregoing reasons, the judgment of the lower Courts should be affirmed and jurisdiction of this matter should be denied.

Respectfully submitted,

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ATTORNEY FOR APPELLEE, HANCOCK COUNTY
CHILDREN SERVICES BOARD

(Amended Substitute House Bill No. 662)

File 356

AN ACT

eff. 10-24-80

To amend sections 2151.011, 2151.281, 2151.35, 2151.353, 2151.38, and 5103.151, and to enact sections 2151.412, 2151.413, and 2151.414 of the Revised Code to authorize a juvenile court to grant permanent custody of a child to an agency to which it had previously granted temporary custody of the child upon application of the agency and a finding by the court that the child's parents have acted, and will continue to act, in such a manner that the child is without proper parental care or guardianship and to require certain reports and treatment plans to be filed by agencies that want to have or have temporary custody of certain children.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 2151.011, 2151.281, 2151.35, 2151.353, 2151.38, and 5103.151 be amended and sections 2151.412, 2151.413, and 2151.414 of the Revised Code be enacted to read as follows:

Sec. 2151.011. (A) As used in the Revised Code:

(1) "Juvenile court" means the division of the court of common pleas or a juvenile court separately and independently created having jurisdiction under Chapter 2151. of the Revised Code.

(2) "Juvenile judge" means a judge of a court having jurisdiction under Chapter 2151. of the Revised Code.

(B) As used in ~~sections 2151.01 to 2151.99, inclusive, of the Revised Code~~ THIS CHAPTER:

(1) "Child" means a person who is under the age of eighteen years, with the exception that any child who violates a federal or state law or municipal ordinance prior to attaining eighteen years of age shall be deemed a "child" irrespective of his age at the time the complaint is filed or hearing had thereon.

(2) "Adult" means an individual eighteen years of age or older.

(3) "Detention" means the temporary care of children in restricted facilities pending court adjudication or disposition.

(4) "Shelter" means the temporary care of children in physically unrestricted facilities pending court adjudication or disposition.

(5) "Foster home" means a family home in which any child is received apart from his parents for care, supervision, or training.

(6) "Certified foster home" means a foster home operated by persons holding a permit in force, issued under sections 5103.03 to 5103.05, ~~inclusive~~, of the Revised Code.

(7) "Approved foster care" means facilities approved by the youth commission under sections 5139.36 to 5139.40 ~~inclusive~~, of the Revised Code.

(8) "Organization" means any institution, public, semipublic, or private, and any private association, society, or agency located or operating in the state, incorporated or unincorporated, having among its functions the furnishing of protective services or care for children, or the placement of children in foster homes or elsewhere.

(9) "Certified organization" means any organization mentioned under division (B)(8) of this section which holds a certificate in force, issued under sections 5103.03 to 5103.05 ~~inclusive~~, of the Revised Code.

(10) "Legal custody" means a legal status created by court order which vests in the custodian the right to have physical care and control of the child and to determine where and with whom he shall live, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

(11) "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the person, including but not necessarily limited to the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.

(12) "Permanent custody" means a legal status created by the court which vests in the county department of welfare which has assumed the administration of child welfare, county welfare CHILDREN SERVICES board, or certified organization, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations.

(13) "Temporary custody" means legal custody as defined in division (B) (10) of this section which may be terminated at any time at the discretion of the court.

(14) "Commit" means to vest custody as ordered by the court.

(15) "Probation" means a legal status created by court order following an adjudication that a child is delinquent, a juvenile traffic offender, or unruly whereby the child is permitted to remain in the parent's, guardian's, or custodian's home subject to supervision, or under the supervision of any agency designated by the court and returned to the court for violation of probation at any time during the period of probation.

(16) "Protective supervision" means a legal status created by court order whereby the child is permitted to remain in the parent's, guardian's, or custodian's home under supervision and subject to return to the court during the period of protective supervision.

(17) "ADEQUATE PARENTAL CARE" MEANS THE PROVISION OF ADEQUATE FOOD, CLOTHING, AND SHELTER TO ENSURE A CHILD'S HEALTH AND PHYSICAL SAFETY AND THE PROVISION OF SPECIALIZED SERVICES WARRANTED BY A CHILD'S PHYSICAL OR MENTAL NEEDS.

• Sec. 2151.281. The court shall appoint a guardian ad litem to protect the interest of a child in any proceeding concerning an alleged or adjudicated delinquent, OR unruly ~~or dependent~~ child when:

(A) The child has no parent, guardian, or legal custodian;

(B) The court finds that there is a conflict of interest between the child and his parent, guardian, or legal custodian.

The court shall appoint a guardian ad litem to protect the interest of a child in any proceeding concerning an alleged abused or neglected child, AND IN ANY PROCEEDING HELD PURSUANT TO SECTION 2151.414 OF THE REVISED CODE.

In any proceeding concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child where the parent appears to be mentally incompetent or is under eighteen years of age, the court shall appoint a guardian ad litem to protect the interest of such parent.

The court shall require such guardian ad litem to faithfully discharge his duties, and upon his failure to do so shall discharge him and appoint another. The court may fix compensation for the service of the guardian ad litem which shall be paid from the treasury of the county.

A parent who is eighteen years of age or older and not mentally incompetent shall be deemed sui juris for the purpose of any proceeding relative to his child alleged or adjudicated to be an abused, neglected, or dependent child.

In any case wherein a parent of a child alleged or adjudicated to be an abused, neglected, or dependent child is under eighteen years of age, the parents of said parent shall be summoned to appear at any hearing respecting the alleged or adjudicated to be an abused, neglected, or dependent child.

• Sec. 2151.35. The juvenile court may conduct its hearings in an informal manner and may adjourn such hearings from time to time. In the hearing of any case, the general public may be excluded and only such persons admitted as have a direct interest in the case.

All cases involving children shall be heard separately and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in cases involving abused, neglected, or dependent children. The court shall hear and determine all cases of children without a jury.

If the court finds from clear and convincing evidence that the child is a ~~delinquent, unruly,~~ AN abused, neglected, or dependent child, or FINDS BEYOND A REASONABLE DOUBT THAT THE CHILD IS A DELINQUENT OR UNRULY CHILD OR a juvenile traffic offender, the court shall proceed immediately, or at a postponed hearing, to hear the evidence as to the proper disposition to be made under sections 2151.352 to 2151.355 of the Revised Code. If the court does not so find, it shall order that the complaint be dismissed and that the child be discharged from any detention or restriction theretofore ordered.

A record of all testimony and other oral proceedings in juvenile court shall be made IN ALL PROCEEDINGS THAT ARE HELD PURSUANT TO SECTION 2151.414 OF THE REVISED CODE OR IN WHICH AN ORDER OF DISPOSITION MAY BE MADE PURSUANT TO DIVISION(A)(4) OF SECTION 2151.353 OF THE REVISED CODE, AND SHALL BE MADE upon request IN ANY OTHER PROCEEDINGS. THE RECORD SHALL BE MADE as provided in section 2301.20 of the Revised Code.

• Sec. 2151.353. (A) If the child is adjudged an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

~~(A)~~ (1) Permit the child to remain with his parents, guardian, or other custodian, subject to such conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child;

~~(B)~~ (2) Commit the child to the temporary custody of the department of public welfare, a county department of welfare which has assumed the administration of child welfare, county children services board, any other certified organization, the Ohio youth commission for the purpose of diagnostic study and report as provided by division (B) of section 5139.05 of the Revised Code, either parent or a relative residing within or outside the state, or a probation officer for placement in a certified foster home;

~~(C)~~ (3) Commit the child to the temporary custody of any institution or agency in this state or another state authorized and qualified to provide the care, treatment, or placement that the child requires;

~~(D)~~ (4) Commit the child permanently to THE PERMANENT CUSTODY OF the county department of welfare which has assumed the administration of child welfare, county children services board, or to any other certified agency ORGANIZATION, IF THE COURT DETERMINES THAT THE PARENTS HAVE ACTED IN SUCH A MANNER THAT THE CHILD IS A CHILD WITHOUT ADEQUATE PARENTAL CARE, IT IS LIKELY THAT THE PARENTS WOULD CONTINUE TO ACT IN SUCH A MANNER THAT THE CHILD WILL CONTINUE TO BE A CHILD WITHOUT ADEQUATE PARENTAL CARE IF A REUNIFICATION PLAN WERE PREPARED PURSUANT TO SECTION 2151.412 OF THE REVISED CODE, AND THE PERMANENT COMMITMENT IS IN THE BEST INTERESTS OF THE CHILD. IF THE COURT GRANTS PERMANENT CUSTODY UNDER THIS DIVISION, THE COURT, UPON THE REQUEST OF ANY PARTY, SHALL FILE A WRITTEN OPINION SETTING FORTH ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW IN RELATION TO THE PROCEEDING. Upon such commitment the natural or adoptive parents are divested of all legal rights and obligations due from them to the child or from the child to them.

(B) No order for permanent custody shall be made at the hearing wherein AT WHICH the child is adjudicated abused, neglected, or dependent except and unless the complaint alleging the abuse, neglect, or dependency contains a prayer requesting such permanent custody and the summons served on the parents contains a full explanation that the granting of such an order FOR PERMANENT CUSTODY permanently divests them of their parental rights AND CONTAINS A FULL EXPLANATION OF THEIR RIGHT TO BE REPRESENTED BY COUNSEL AND TO HAVE COUNSEL APPOINTED PURSUANT TO CHAPTER 120. OF THE REVISED CODE IF THEY ARE INDIGENT.

IF AFTER MAKING DISPOSITION AS AUTHORIZED BY DIVISION (A)(2) OR (3) OF THIS SECTION, A MOTION IS FILED IN ACCORDANCE WITH SECTION 2151.413 OF THE REVISED CODE, WHICH MOTION REQUESTS PERMANENT CUSTODY OF THE CHILD, THE COURT MAY GRANT PERMANENT CUSTODY OF THE CHILD TO THE MOVANT IN ACCORDANCE WITH SECTION 2151.414 OF THE REVISED CODE.

(C) NO ORDER OF TEMPORARY CUSTODY SHALL BE MADE UNLESS THE SUMMONS SERVED ON THE PARENTS CONTAINS A STATEMENT THAT AN ADJUDICATION OF ABUSE, NEGLECT, OR DEPENDENCY MAY RESULT IN AN ORDER OF TEMPORARY CUSTODY, A FULL EXPLANATION THAT THE GRANTING OF AN ORDER OF TEMPORARY CUSTODY WILL CAUSE THE REMOVAL OF THE CHILD FROM THEIR LEGAL CUSTODY UNTIL THE COURT TERMINATES THE ORDER OF TEMPORARY CUSTODY OR PERMANENTLY DIVESTS THEM OF THEIR PARENTAL RIGHTS, AND A FULL EXPLANATION OF THEIR RIGHT TO BE REPRESENTED BY COUNSEL AND TO HAVE COUNSEL APPOINTED PURSUANT TO

CHAPTER 120. OF THE REVISED CODE IF THEY ARE INDIGENT.

• Sec. 2151.28. When a child is committed to the legal custody of the youth commission, or to the permanent custody of a county department of welfare which THAT has assumed the administration of child welfare, A county children services board, or A certified organization OR COMMITTED PURSUANT TO DIVISION (A) (4) OF SECTION 2151.353 OR 2151.44 OF THE REVISED CODE, the jurisdiction of the juvenile court in respect to the child so committed shall cease and terminate at the time of commitment, except that if the department or any county department, board, or certified organization having such permanent custody makes application A MOTION to the court for the termination of such PERMANENT custody, the court upon such application THE MOTION, after notice and hearing and for good cause shown, may terminate such PERMANENT custody at any time prior to the child becoming of age. The court shall make disposition of the matter in whatever manner will serve the best interests of the child. All other commitments made by the court shall be temporary and shall continue for such A period as THAT IS designated by the court in its order, or until terminated or modified by the court, or until a child attains the age of twenty-one years.

• Sec. 2151.412. (A) WHEN A CHILD IS ADJUDICATED AN ABUSED, NEGLECTED, OR DEPENDENT CHILD AND THE COURT, PURSUANT TO DIVISION (A)(2) OR (3) OF SECTION 2151.353 OF THE REVISED CODE, ORDERS COMMITMENT OF THE CHILD TO THE TEMPORARY CUSTODY OF THE DEPARTMENT OF PUBLIC WELFARE, A COUNTY DEPARTMENT OF WELFARE THAT HAS ASSUMED THE ADMINISTRATION OF CHILD WELFARE, A COUNTY CHILDREN SERVICES BOARD, OR ANY CERTIFIED ORGANIZATION, THE DEPARTMENT, COUNTY DEPARTMENT, BOARD, OR ORGANIZATION SHALL SUBMIT AN INITIAL PLAN TO THE COURT, AFTER A REASONABLE ATTEMPT TO CONSULT WITH ALL PARTIES, WHICH INITIAL PLAN SHALL BE PREPARED IN ACCORDANCE WITH DIVISION (B) OF THIS SECTION. THE COURT SHALL APPROVE AN INITIAL PLAN PRIOR TO THE EXECUTION OF THE ORDER OF DISPOSITION OF THE CHILD. THE APPROVED INITIAL PLAN SHALL BE INCORPORATED INTO THE JUDGMENT ENTRY SETTING FORTH THE DISPOSITION MADE OF THE CHILD, AND COPIES OF THE JUDGMENT ENTRY SHALL BE SENT TO ALL PARTIES.

(B) THE INITIAL PLAN SUBMITTED TO THE COURT AS REQUIRED BY DIVISION (A) OF THIS SECTION SHALL INCLUDE ONE OF THE FOLLOWING:

(1) IF THE CHILD IS NOT ABANDONED OR ORPHANED OR IF THE PARENTS OF AN ABANDONED CHILD ARE LOCATED, THE FOLLOWING:

(a) A SCHEDULE FOR REGULAR AND FREQUENT CONSULTATION BETWEEN THE PARENTS AND THE DEPARTMENT, COUNTY DEPARTMENT, BOARD, OR CERTIFIED ORGANIZATION TO WHICH THE CHILD IS TEMPORARILY COMMITTED;

(b) IF THE CHILD IS TO BE REMOVED FROM THE HOME, THE FOLLOWING:

(i) A PARENT AND CHILD VISITATION SCHEDULE THAT BEGINS AS SOON AS POSSIBLE AND THAT PROVIDES FOR REGULAR AND FREQUENT VISITATION AND COMMUNICATION OR OTHER CONTACT BETWEEN THE PARENTS AND CHILD, WHICH SCHEDULE SHALL INCLUDE ONLY SUPERVISED VISITATION IF UNSUPERVISED VISITATION MAY RESULT IN HARM TO THE CHILD;

(ii) A PAYMENT SCHEDULE, BASED UPON THE PARENTS' ABILITY TO PAY, THAT PROVIDES FOR PAYMENT BY THE PARENTS OF THE COST OF THE SUBSTITUTE PHYSICAL CARE AND MAINTENANCE GIVEN TO THE CHILD BY THE DEPARTMENT, COUNTY DEPARTMENT, BOARD, OR CERTIFIED ORGANIZATION TO WHICH THE CHILD IS TEMPORARILY COMMITTED;

(2) IF THE CHILD IS ABANDONED AND THERE HAS BEEN NO CONTACT WITH THE PARENTS, THE EFFORTS THAT WILL BE TAKEN TO LOCATE THE PARENTS AND WHO WILL MAKE THE EFFORTS. IF THE PARENTS ARE LOCATED, A REVISED INITIAL PLAN SHALL BE SUBMITTED TO THE COURT, AND THE REVISED PLAN SHALL COMPLY WITH DIVISION (B)(1) OF THIS SECTION.

(3) IF THE CHILD IS ORPHANED, THE EFFORTS THAT WILL BE TAKEN TO DETERMINE WHETHER ANY LIVING RELATIVES OF THE CHILD ARE WILLING AND ABLE TO ACCEPT PERMANENT CUSTODY OF THE CHILD AND WHO WILL MAKE THE EFFORTS.

(C) THE DEPARTMENT, COUNTY DEPARTMENT, BOARD, OR CERTIFIED ORGANIZATION THAT HAS TEMPORARY CUSTODY OF A CHILD WHO IS NOT ABANDONED OR ORPHANED OR CUSTODY OF A CHILD FOR WHOM A REVISED INITIAL PLAN IS SUBMITTED PURSUANT TO DIVISION (B)(2) OF THIS SECTION SHALL, WITHIN SIXTY DAYS AFTER THE ISSUANCE OF THE TEMPORARY CUSTODY ORDER OR SIXTY DAYS AFTER APPROVAL OF THE REVISED INITIAL PLAN, PREPARE AND FILE WITH THE COURT A COMPREHENSIVE REUNIFICATION PLAN FOR THE CHILD, WHICH PLAN SHALL BE PREPARED IN ACCORDANCE WITH DIVISION (D) OF THIS SECTION. THE COMPREHENSIVE PLAN SHALL BE DESIGNED TO REHABILITATE AND REUNITE THE CHILD'S FAMILY. THE COURT SHALL PROVIDE A COPY OF THE COMPREHENSIVE REUNIFICATION PLAN TO ALL PARTIES IN THE ACTION, AND ANY PARTY TO THE ACTION MAY, WITHIN SEVEN DAYS AFTER RECEIVING A COPY OF THE PLAN, FILE AN OBJECTION TO THE PLAN. IF ANY PARTY FILES AN OBJECTION TO THE PLAN, THE COURT SHALL CONSIDER THE ISSUES RAISED BY THE OBJECTION, AND MAY HOLD A HEARING ON THE OBJECTION WITHIN FOURTEEN DAYS AFTER IT IS FILED. WHEN ALL ISSUES WITH RESPECT TO THE PLAN ARE RESOLVED, THE COURT SHALL APPROVE THE PLAN AND INCORPORATE THE PLAN INTO THE JUDGMENT ENTRY SETTING FORTH THE DISPOSITION MADE OF THE CHILD.

(D) THE COMPREHENSIVE REUNIFICATION PLAN SUBMITTED TO THE COURT AS REQUIRED BY DIVISION (C) OF THIS SECTION SHALL INCLUDE ALL OF THE FOLLOWING:

(1) THE SERVICES OR TREATMENT THAT WILL BE PROVIDED OR OFFERED TO THE CHILD'S PARENTS TO FACILITATE REHABILITATION;

(2) THE ACTIONS THAT THE PARENTS ARE REQUIRED TO TAKE TO ADJUST THEIR CONDUCT OR CONDITIONS SO THAT THE CHILD WILL NO LONGER BE WITHOUT ADEQUATE PARENTAL CARE;

(3) THE SERVICES OR TREATMENT THAT WILL BE PROVIDED OR OFFERED TO THE CHILD;

(4) THE REQUIREMENTS OF DIVISION (B)(1) OF THIS SECTION.

(E) ANY PARTY TO THE ACTION AND THE COURT MAY FILE A MOTION WITH THE COURT REQUESTING THAT AN INITIAL PLAN OR COMPREHENSIVE REUNIFICATION PLAN PREPARED PURSUANT TO THIS SECTION BE MODIFIED. THE COURT SHALL NOTIFY ALL PARTIES TO THE ACTION THAT THE MOTION HAS BEEN FILED, AND ANY PARTY TO THE ACTION MAY, WITHIN SEVEN DAYS AFTER RECEIVING THE NOTICE, FILE AN OBJECTION TO THE MOTION. THE COURT SHALL INCORPORATE THE MODIFICATION OF THE PLAN INTO THE JUDGMENT ENTRY SETTING FORTH THE DISPOSITION MADE OF THE CHILD IF NO OBJECTION TO THE MODIFICATION IS FILED WITHIN THE SEVEN-DAY PERIOD. IF ANY PARTY FILES AN OBJECTION TO THE MODIFIED PLAN, THE COURT SHALL CONSIDER THE ISSUES RAISED BY THE OBJECTION, AND MAY HOLD A HEARING ON THE MODIFIED PLAN WITHIN FOURTEEN DAYS AFTER THE OBJECTION IS FILED. IF THE COURT APPROVES ANY MODIFICATION OF THE INITIAL PLAN OR THE COMPREHENSIVE REUNIFICATION PLAN, THE COURT SHALL INCORPORATE THE MODIFICATION OF THE PLAN INTO THE JUDGMENT ENTRY SETTING FORTH THE DISPOSITION MADE OF THE CHILD.

• Sec. 2151.413. (A) A COUNTY DEPARTMENT, BOARD, OR CERTIFIED ORGANIZATION THAT IS GRANTED TEMPORARY CUSTODY PURSUANT TO AN ORDER OF DISPOSITION UNDER DIVISION (A)(2) OR (3) OF SECTION 2151.353 OF THE REVISED CODE OF A CHILD THAT IS NOT ABANDONED OR ORPHANED OR OF AN ABANDONED CHILD WHOSE PARENTS HAVE BEEN LOCATED MAY FILE A MOTION IN THE COURT THAT MADE THE DISPOSITION OF THE CHILD REQUESTING PERMANENT CUSTODY OF THE CHILD IF A PERIOD OF AT LEAST SIX MONTHS HAS ELAPSED SINCE THE ORDER OF TEMPORARY CUSTODY WAS ISSUED OR THE SUBMISSION OF THE REVISED INITIAL PLAN IF THE CHILD IS AN ABANDONED CHILD WHOSE PARENTS HAVE BEEN LOCATED.

(B) A COUNTY DEPARTMENT, BOARD, OR CERTIFIED ORGANIZATION THAT IS GRANTED TEMPORARY CUSTODY PURSUANT TO AN ORDER OF DISPOSITION UNDER DIVISION (A)(2) OR (3) OF SECTION 2151.353 OF THE REVISED CODE OF A CHILD THAT IS ABANDONED OR ORPHANED MAY FILE A MOTION IN THE COURT THAT MADE THE DISPOSITION OF THE CHILD REQUEST-

ING PERMANENT CUSTODY OF THE CHILD, IF THE CHILD IS ABANDONED, WHENEVER IT CAN SHOW THE COURT THAT THE PARENTS CANNOT BE LOCATED AND, IF THE CHILD IS ORPHANED, WHENEVER IT CAN SHOW THAT NO RELATIVE OF THE CHILD IS ABLE TO TAKE PERMANENT CUSTODY OF THE CHILD.

• Sec. 2151.414. (A) UPON THE FILING OF A MOTION FOR PERMANENT CUSTODY OF A CHILD BY A COUNTY DEPARTMENT, BOARD, OR CERTIFIED ORGANIZATION THAT HAS TEMPORARY CUSTODY OF THE CHILD, THE COURT SHALL GIVE NOTICE OF THE FILING OF THE MOTION AND OF THE HEARING, IN ACCORDANCE WITH SECTION 2151.29 OF THE REVISED CODE, TO ALL PARTIES TO THE ACTION, WHICH NOTICE SHALL CONTAIN A FULL EXPLANATION THAT THE GRANTING OF PERMANENT CUSTODY PERMANENTLY DIVESTS THE PARENTS OF THEIR PARENTAL RIGHTS AND A FULL EXPLANATION OF THEIR RIGHT TO BE REPRESENTED BY COUNSEL AND TO HAVE COUNSEL APPOINTED PURSUANT TO CHAPTER 120. OF THE REVISED CODE IF THEY ARE INDIGENT, AND SHALL CONDUCT A HEARING TO DETERMINE ALL OF THE FOLLOWING:

(1) IF THE COUNTY DEPARTMENT, BOARD, OR CERTIFIED ORGANIZATION HAS MADE A GOOD FAITH EFFORT TO IMPLEMENT THE INITIAL AND COMPREHENSIVE REUNIFICATION PLANS FOR THE CHILD THAT WERE APPROVED BY THE COURT PURSUANT TO SECTION 2151.412 OF THE REVISED CODE;

(2) IF THE PARENTS HAVE ACTED IN SUCH A MANNER THAT THE CHILD IS A CHILD WITHOUT ADEQUATE PARENTAL CARE, AND WILL CONTINUE TO ACT IN THE NEAR FUTURE IN SUCH A MANNER THAT THE CHILD WILL CONTINUE TO BE A CHILD WITHOUT ADEQUATE PARENTAL CARE. IN MAKING THIS DETERMINATION, THE COURT SHALL CONSIDER ALL RELEVANT FACTORS, INCLUDING BUT NOT LIMITED TO, THE FOLLOWING CONSIDERATIONS:

(a) THE EXTENT TO WHICH THE PARENTS OF THE CHILD HAVE CONFORMED TO THE INITIAL AND COMPREHENSIVE PLANS FOR THE CHILD THAT WERE APPROVED BY THE COURT PURSUANT TO SECTION 2151.412 OF THE REVISED CODE AND THE EXTENT TO WHICH THE PARENTS HAVE FULFILLED THEIR OBLIGATIONS UNDER THE PLANS;

(b) ANY EXISTING EMOTIONAL OR MENTAL DISORDERS OF THE PARENTS AND THE ANTICIPATED DURATION OF THE DISORDERS;

(c) ANY PHYSICAL, EMOTIONAL, OR SEXUAL ABUSE OF THE CHILD BY THE PARENTS THAT OCCURS BETWEEN THE DATE THAT THE ORIGINAL COMPLAINT ALLEGING ABUSE WAS FILED AND THE DATE OF THE FILING OF THE MOTION FOR PERMANENT CUSTODY;

(d) ANY EXISTING EXCESSIVE USE OF INTOXICATING LIQUOR OR DRUGS OF ABUSE BY THE PARENTS;

(e) ANY PHYSICAL, EMOTIONAL, OR MENTAL NEGLECT OF THE CHILD BY THE PARENTS THAT OCCURS BETWEEN THE DATE THAT THE ORIGINAL COMPLAINT ALLEGING NEGLECT WAS FILED AND THE DATE OF THE FILING OF THE MOTION FOR PERMANENT CUSTODY.

(3) IF IT IS IN THE BEST INTEREST OF THE CHILD TO PERMANENTLY TERMINATE PARENTAL RIGHTS.

(B) THE COURT MAY GRANT PERMANENT CUSTODY OF A CHILD TO A MOVANT IF THE COURT DETERMINES AT THE HEARING HELD PURSUANT TO DIVISION (A) OF THIS SECTION, BY CLEAR AND CONVINCING EVIDENCE, THAT THE CHILD IS NOT ABANDONED OR ORPHANED AND THE PARENTS HAVE ACTED IN SUCH A MANNER THAT THE CHILD IS A CHILD WITHOUT ADEQUATE PARENTAL CARE, AND WILL CONTINUE TO ACT IN THE NEAR FUTURE IN SUCH A MANNER THAT THE CHILD WILL CONTINUE TO BE A CHILD WITHOUT ADEQUATE PARENTAL CARE, THAT THE CHILD IS ABANDONED AND THE PARENTS CANNOT BE LOCATED, OR THAT THE CHILD IS ORPHANED AND THERE ARE NO RELATIVES OF THE CHILD WHO ARE ABLE TO TAKE PERMANENT CUSTODY. THE COURT MAY CONSIDER THE WISHES OF THE CHILD IN RELATION TO THE MOTION FOR PERMANENT CUSTODY AND THE CUSTODIAL HISTORY OF THE CHILD AS FACTORS IN MAKING ITS DETERMINATION, BUT THE WISHES AND CUSTODIAL HISTORY OF THE CHILD SHALL NOT CONTROL THE DECISION OF THE COURT. IF THE COURT GRANTS PERMANENT CUSTODY OF A CHILD TO A MOVANT UNDER THIS DIVISION, THE COURT, UPON THE REQUEST OF ANY PARTY, SHALL FILE A WRITTEN OPINION SETTING FORTH ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW IN RELATION TO THE PROCEEDING.

• Sec. 5103.151. (A) An annual review shall be made of every child placed in the care or custody of a public or private organization, society, association, agency, or individual certified to care for children or certified to place children pursuant to sections 5103.02 and 5103.03 of the Revised Code. This review shall be made by the agency having custody of the child, whether the custody or care arrangement is temporary or permanent, and whether the agency received custody pursuant to court order under Chapter 2151. or pursuant to section 5103.15 of the Revised Code, or whether the child is in temporary care as a consequence of the issuance of an emergency court disposition pursuant to section 2151.33 of the Revised Code.

(B) The annual review made by the agency having custody of a child shall be filed with the juvenile court that placed the child or in the case of a child placed pursuant to section 5103.15 of the Revised Code with the juvenile court of the county in which the child resides. The initial review shall be made and submitted to the court ~~within four months of the effective date of this section and with respect to placements made after the effective date of this section, the initial review shall be made and submitted within four months~~ SIXTY DAYS after placement of the child. A review shall be made annually thereafter, except that a juvenile court may order a review to be done more frequently. Every report of an annual review shall include at a minimum, an evaluation of the child based on the following:

(1) The extent of the care and support provided by the parents, or parent, while the child is in temporary custody;

(2) The extent of communication with the child by the parents, parent, or guardian;

(3) The degree of compliance by the agency with what is in the best interests of the child;

(4) A recommendation for the child that includes a plan for the future and permanent placement or custody of the child, and the methods of achieving the objective. The plan shall be framed with the objective of doing what is in the best interests of the child.

(5) The nature and utilization of any social services offered to the parent or guardian in order to restore the home and return the child to the home, whether offered by the agency having custody or care of the child, another agency, or the court;

(6) ANY OTHER FACTORS IDENTIFIED IN THE INITIAL PLAN OR COMPREHENSIVE PLAN PREPARED PURSUANT TO SECTION 2151.412 OF THE REVISED CODE.

(C) The review procedures used by each agency having custody of children shall be examined and approved by the juvenile court that receives the report of the annual review of a child from an agency or by a five-member county board appointed for that purpose by the presiding judge of the juvenile court. Every report submitted to the juvenile court shall be reviewed and evaluated by the juvenile court or the board appointed by the court, and the juvenile court or board shall, within ninety days of the filing of the report, approve the report or order it revised. If a board is appointed, it shall consist of one member representing the general public and four members who are trained or experienced in the care or placement of children by training or experience in the fields of medicine, psychology, social work, education, or related fields. Of the initial appointments made to the board, two shall be for a term ending one year after the effective date of their appointments, two shall be for a term ending two years after that date, and one shall be for a term ending three years after that date. Thereafter, terms shall be for three years, each term ending on the same day of the same month of the year as did the term which it succeeds. Each member shall hold office from the date of his appointment until the end of the term for which he was appointed. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall hold office for the remainder of such term.

(D) A copy of the report, together with any revisions, shall be sent to the department of public welfare.

(E) The juvenile court that receives the annual review, upon determining, either from the annual review or otherwise, that the custody or care arrangement is not in the best interests of the child may terminate the custody of an agency and place the child in the custody of another public or private organization, society, association, agency, or individual certified pursuant to sections 5103.02 and 5103.03 of the Revised Code.

(F) The department of public welfare shall report annually to the public and to the general assembly on the results of the annual review of placement plans of each agency and on the results of the summaries submitted to the department under section 3107.10 of the Revised Code. The annual report shall

include among other information that may be required by the department:

(1) An analysis of the findings contained in the reports of the annual review of children;

(2) The number of children in care or custody and for whom an annual review was conducted, and the number of children whose custody status changed during the period;

(3) An analysis of the utilization of public social services by agencies and parents or guardians, and the utilization of the adoption listing service of the department pursuant to section 5103.152 of the Revised Code;

(4) A compilation and analysis of data submitted to the department under section 3107.10 of the Revised Code.

SECTION 2. That existing sections 2151.011, 2151.281, 2151.35, 2151.353, 2151.38, and 5103.151 of the Revised Code are hereby repealed.

SECTION 3. The second annual review made after the effective date of this act of any child who is in temporary custody upon the effective date of this act pursuant to a court order under Chapter 2151. of the Revised Code or pursuant to section 5103.15 of the Revised Code, which annual review is made pursuant to section 5103.151 of the Revised Code, shall include a comprehensive reunification plan prepared in accordance with division (D) of section 2151.412 of the Revised Code for the child if he is not abandoned or orphaned, a report on the attempts made to locate the parents of the child if he is an abandoned child, or a report on the attempts made to find a relative of the child who will take permanent custody of the child if he is an orphaned child.

Upon the filing of the second such annual review made after the effective date of this act, the court shall hold a hearing to inquire into the future plans that the agency filing the report has for the placement of the child or for the return of the child to his parents.